that although the state has exercised considerable authority over NCRC in the past 170 years, it has done so as NCRC's sole shareholder rather than in its "capacity as a sovereign."[29]

The supreme court sent a message: in the battle between corporate privacy and public records access, privacy prevails. This shades NCRC and other private entities "sunburned"[30] by sunshine laws like the PRA—at the peril of transparency. This decision flouts the public's "right to know"[31] and damages the fourth estate. Moreover, to the extent one believes SELC made the PRA request in good faith and in accordance with its mission,[32] the decision may cause material harm to the environment and have a detrimental effect on minority populations.[33]

II. The Fundamental but Reconcilable Tension Between Privacy and Transparency

In *SELC*, the key dispute is the PRA's applicability. Both sides agree that public entities are subject to the PRA. The majority holds that consistent maintenance of a separate corporate identity and structure and independence from direct state operational oversight immunize private entities like NCRC from the PRA.[34] The dissent argues that this preoccupation with form distracts from the substance of NCRC's public actions, ignores how "substantially intertwined"[35] the state and NCRC are, and defies both precedent and the legislative intent behind the PRA.

The dispute between the parties evokes a fundamental tension with broad implications.[36] The public records and public information compiled by the agencies of state government or its subdivisions are the property of the people,[37] but a right to privacy has been inferred from the United States Constitution.[38] NCRC makes a slippery-slope argument that a ruling in favor of SELC would expose to the PRA the many private and nonprofit institutions in whom the state invests as a shareholder, essentially depriving them of their constitutional "right" to privacy.[39]

Reconciling these competing interests is difficult, but solutions exist that protect both privacy and transparency. Subjecting NCRC to the PRA need not make it a public agency for all

purposes,[40] nor would it grant unfettered access to its records. Rather, it would restrict access to public records.[41] NCRC would reserve the right not to disclose confidential business information and records whose dissemination might frustrate the purpose for which they were created.[42]

It is unclear exactly why NCRC wished not to be subject to the PRA. Sadly, the record is sparse regarding the details of the motivations of the parties in *SELC*. Ignorance of their concerns makes it harder to know how to tailor a just remedy that attends to the valid concerns of each party. Moreover, context might reveal a reasonable motive by NCRC to oppose disclosure, or might reveal a pernicious motive by SELC to harass NCRC baselessly. But in the absence of such context, it seems strange to defer to an undefined fear at the expense of transparency.

Accessing documents from entities whose behavior impacts the public is value-neutral. It may well be that the sage board members of NCRC averted a disastrous boondoggle by abandoning the light rail project. Access to the details of such a decision would benefit the public and could boost constituent confidence. Conversely, if there were some other reason that the project were abandoned, the public should have a chance to assess that reasoning, since the NCRC will necessarily be involved in future light rail projects.[43] And were there malfeasance,[44] people have the right to access the information they need to hold the government accountable—this is the purpose behind the PRA.[45] This kind of speculation would be unnecessary if NCRC's records were publicly accessible. Creating a legal path to such access requires prevailing attitudes about privacy to be dismantled and the current juridical approach to be reconsidered.

III. The Quasi-Government Doctrine and the Limits of Broad Construction

The court in *SELC* called "sovereign authority" an "important feature" in assessing PRA applicability. But this standard is vague, and sovereignty can be outsourced.[46] The quasi-government doctrine encourages government accountability commensurate with outsourcing by

scrutinizing entities once outside the purview of sunshine laws. Accordingly, in North Carolina, "the [PRA] is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions."[47] A presumption of complete access to quasi-governmental entities' records exists in other jurisdictions[48] as well, and recent United States Supreme Court decisions have emphasized broad democratic policies favoring openness.[49] But this doctrine is narrow,[50] and the supreme court has discretion to defer to the Attorney General, State Ethics Commission, and Progress Evaluation Division instead.

This results in an absence of bright-line rules, which permits extreme deviations in logic. The same facts relied on by the supreme court to conclude that NCRC is not subject to the PRA could be used to mount an argument with a conclusion precisely to the contrary. For example, the General Assembly (GA), for the purposes of a 2011 study, determined that NCRC was a "state agency."[51] The majority deploys this fact as though it clearly settles the question of whether NCRC is now a private or public entity for the purposes of the PRA, but ignores the obvious inference that follows: NCRC can be considered "public" for at least some purposes.[52]

Likewise, one might interpret the fact that members of NCRC's board were able to request state insurance as proof that NCRC is a public entity.[53] That it had to be statutorily disclaimed to the contrary might suggest to cynics that the word "private" is being used in bad faith to shield entities that seem to otherwise act like the government. Furthermore, the fact that in 2000 the GA passed an act giving NCRC the power of eminent domain may signal to laypersons that NCRC functions like the state.[54] While of course there are differences between the powers afforded to private and public condemnors,[55] both, crucially, are capable of acquiring property by eminent domain for the purpose of public use or benefit—a classic state power.

When entities can do the things governments do, they should be held to the same level of accountability as governments.[56] The fact that the supreme court credulously drew a conclusion to the contrary in *SELC* indicates just how excessively flexible the current approach is. Therefore, merely appealing to broaden the construction of the PRA is insufficient. Instead, the problem should be remedied via a legislative amendment to the PRA specifying a nature-of-the-records approach to supersede the existing approach. This would inhibit judicial legislation, adapt to creeping privatization, and robustly protect the legislative intent behind the PRA.

IV. Why a Nature-of-the-Records Approach is the Best Way Forward

The controlling "totality of the circumstances" approach affords the judiciary excessive latitude to frame the relationship between corporations and government. As a category, "agency of North Carolina or its subdivisions" is outdated and maladapted to the current terrain of privatization among entities serving the public. Protecting the right to know requires an approach that focuses on the substance of records requested, rather than on the form of their custodian.

The nature-of-the-records approach does so. It does not require any enumerated factors for access, making private entities' documents accessible by the public *provided the documents relate to the government*.[57] Unless courts recognize that public documents belong to the public regardless of who possesses them, they are violating the spirit of sunshine laws.[58] If a majority of courts viewed the privatization issue from a nature-of-records perspective, there would be no need to fear the growing privatization movement from a public access standpoint.[59]

Opponents will argue the nature-of-the-records approach begs the question regarding statutory interpretation, essentially forcing a broad construction of the PRA and ignoring legislative intent. But ultimately the benefit of an informed citizenry will outweigh any burden imposed on entities subject to the PRA. The adoption of the nature-of-the-records approach

would provide a useful tool in correcting course toward transparency after the pro-opacity precedent set in *SELC*. Protecting corporate privacy offers no comparable public benefit.

Conclusion

In *SELC* the court wrongly framed the issue as a matter of statutory interpretation. The purpose of PRA is clear: to make public records public. But the PRA was written before the age of privatization, and its language is inadequate to accomplish its stated goal. Moving forward, the supreme court can correct course by adopting the nature-of-the-records approach. In the meantime, an attempt by SELC to access the NCRC records possessed by the state pursuant to Internal Improvements[60] may provide a workaround.

NCRC is in a unique position: it is already subject to record disclosure pursuant to state law.[61] The state can request records from NCRC, and audits are provided to the GA.[62] To the extent these records can be construed as "public" pursuant to the PRA, they are the property of the people, including SELC. The majority glosses over this possibility, instead using N.C.G.S. § 124-17(b) & (c) to insist that NCRC was always a private entity and therefore not subject to the PRA. But a good faith (perhaps mediated) discussion among NCRC, SELC, and the state might yield a workable compromise satisfactory to SELC's immediate concerns while providing the confidentiality protection NCRC is due.

It must be remembered that subjecting NCRC to the PRA does not give SELC carte blanche to access its records. Protections and limitations are built in to both the PRA and Internal Improvements[63] to ensure confidential records remain private and only records related to public business are accessible. Given the benefits citizens stand to gain from broader access and the comparatively small burdens imposed on businesses by that access, the court should consider adjusting its approach in PRA litigation to permit access to records based on their substance.

[1] *See, e.g.*, Matthew Sedacca & Katie Van Syckle, *The Ground Where Election Fraud Allegations Grow Freely*, N.Y. TIMES (July 13, 2021), https://www.nytimes.com/2021/07/13/insider/bladen-improvement-association.html; Alan Blinder & Richard Fausset, *Like 'Stepping on a Rake': A Wave of Scandals Hits North Carolina Republicans*, N.Y. TIMES (April 4, 2019), https://www.nytimes.com/2019/04/04/us/north-carolina-republicans.html.

[2] S.B. 473, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

[3] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (Frederick A. Stokes Co. rev. ed. 1932).

[4] Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. OF CIVIC INFO. 1, 7 (2019).

[5] *See Id*.

[6] *See generally* James D. Barnett, *Public Agencies and Private Agencies*, 18 Am. Pol. Sci. R. 34 (1924) (suggesting the distinction between private and public agencies is unclear).

[7] *See id*. at 35 ("The directors of a railroad . . . act in the double capacity as agents for the company and as trustees for the public . . . [t]he corporation is thus both private and public.")

[8] S. Envtl. Law Ctr. v. N. Carolina R.R. Co., 378 N.C. 202, 2021-NCSC-84, ¶ 1.

[9] *Id*. ¶ 1. *But see id*. ¶ 44 ("[C]an a corporate entity, wholly owned by the state . . . directed by a board whose members are appointed by [s]tate elected officials, wielding the power of eminent domain . . . evade public scrutiny under the [PRA]?").

[10] *Id*. ¶ 29.

[11] *See id*. ¶ 19 (detailing SELC's argument regarding application of the nine factors).

[12] *See id*. ¶ 29 (detailing the supreme court's analytical approach).

[13] *Id.*

[14] *See generally* Craig D. Feiser, *Protecting the Public's Right to Know: the Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. UNIV. L. REV. 825 (2000) (analyzing flexible and restrictive interpretive approaches across America).

[15] *See* State v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295 (Wis. 2008), ¶ 32 (discussing quasi-governmental corporations and how to assess entities that are not clearly public or private).

[16] *See* State *ex rel.* Oriana House v. Montgomery, 854 N.E.2d 193 (Ohio 2006), ¶ 36 (contending private entities are not subject to public scrutiny merely by performing services on behalf of the government, and that compelling such entities to adhere to sunshine laws should be difficult).

[17] *See* Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 433 (2015) (describing how citizens can manipulate the government, waste time and resources, and harass public servants with records requests and attendant lawsuits).

[18] Christina Koningisor, *Transparency Deserts*, 114 N.W. UNIV. L. REV. 1461, 1514 (2020) (explaining that following the 1980s local governments widely privatized their services, resulting in formerly "government" functions now being routinely operated by local private actors).

[19] Rizzardi, *supra* note 17, at 436.

[20] *See* Koningisor, *supra* note 18, at 1515 (emphasizing transparency's role in stemming government corruption, mismanagement, and abuse); *see also* SELC, 2021-NCSC-84, ¶ 61 ("It is an uncontestable pre-condition of democratic government that the people have information about the operation of their government." (quoting Sam J. Ervin, Jr., *Controlling "Executive Privilege*," 20 LOY. L. REV 11, 11 (1974))).

[21] *See generally* Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. OF CIVIC INFO. 1, 11 (2019) (describing the doctrine).

[22] S. Envtl. Law Ctr. v. N. Carolina R.R. Co., 378 N.C. 202, 2021-NCSC-84, ¶ 45.

[23] *Id*.

[24] *Id*.

[25] *See id*. n.3 (emphasizing public impact caused by NCRC's abandonment of light rail project).

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *See generally* Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 425 (2015) (lamenting broad public records laws).

[31] *See* Craig D. Feiser, *Protecting the Public's Right to Know: the Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. UNIV. L. REV. 825, 861–64 (2000) (comparatively surveying this "right" across America).

[32] SOUTHERN ENVIRONMENTAL LAW CENTER, https://www.southernenvironment.org/about-us/ (last visited May 8, 2022).

[33] *See generally* Benjamin Chavis, *foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS. 3, 3–5 (Robert D. Bullard ed., South End Press 1993) (explaining environmental racism).

[34] *Id*. ¶ 39.

[35] *Id*. ¶ 55; *See also* Feiser, *supra* note 14, at 859–60 n.223 (suggesting this approach would likely find states intertwined with private entities in constructive possession of their records).

[36] *See* State v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295 (Wis. 2008), ¶ 4 (explaining the tension between vigilance against intentional opacity via privatization, and cognizance of the benefits of flexibility, confidentiality, and efficiency created by privatization).

[37] N.C. GEN. STAT. § 132-1(b) (2019).

[38] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484, 14 L. Ed. 2d 510 (1965) (recognizing a right of marital privacy emanating from penumbras of the guarantees in the Bill of Rights).

[39] *See SELC*, 2021-NCSC-84, ¶ 24 (summarizing a portion of defendants' argument).

[40] *Id*. ¶ 50.

[41] *See id*. ¶ 71 (summarizing the limitations to records access provided for by statute).

[42] *Id*.

[43] READY FOR RAIL, https://www.readyforrailnc.com/ (last visited May 7, 2022).

[44] *See* Christina Koningisor, *Transparency Deserts*, 114 N.W. UNIV. L. REV. 1461, 1484 (2020), (mentioning a state-sanctioned pollution coverup in Iowa).

[45] *SELC*, 2021-NCSC-84, ¶ 49.

[46] *See* Koningisor, *supra* note 25, at 1513 n. 292 (characterizing the recent trend to privatize traditional state functions like prison operations as "outsourcing sovereignty," a move toward secrecy that frustrates accountability and creates separation-of-powers imbalances).

[47] *SELC*, 2021-NCSC-84, ¶ 60 (cleaned up).

[48] *See, e.g.*, Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. OF CIVIC INFO. 1, 20–21 (2019) (listing several state supreme court decisions

across America wherein quasi-public entities were held subject to open-records laws); *see also* Beaver Dam, 752 N.W.2d, ¶ 91 (arguing subjecting quasi-governmental corporations to liberally construed sunshine laws is supported by policy and results in beneficial transparency).

[49] *See* Stewart & Sanders, *supra* note 4, at 22 (suggesting some recent United States Supreme Court decisions have emphasized broad democratic policies favoring openness).

[50] *See* Stewart & Sanders, *supra* note 4, at 20 (describing doctrine as a way to argue private entities on contract with governments are quasi-governmental and thus subject to sunshine laws).

[51] *SELC*, 2021-NCSC-84, ¶ 31.

[52] *Id*. ¶ 65.

[53] *Id*. ¶ 35.

[54] *Id*.

[55] *See* N.C. GEN. STAT. § 40A-3 (2021) (outlining private and public condemnation powers).

[56] *See* Beaver Dam, 752 N.W.2d, ¶ 7 ("If an entity does not want to be subject to [sunshine] laws, then it should change the circumstances under which it operates."); *see also* Oriana House, 854 N.E.2d ¶ 53 (suggesting entities providing public functions be held accountable via sunshine laws for its performance of those functions).

[57] *Id*. at 861 (emphasis added).

[58] *Id*. at 861–62.

[59] *Id*.

[60] N.C. GEN. STAT. § 124 (2013).

[61] *Id*.

[62] *Id*.

[63] *Id*.

Applicant Details

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Applicant Education

BA/BS From	**University of Florida**
Date of BA/BS	**May 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington International Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**GW Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 25, 2023

The Honorable Jamar K. Walker
The United States District Court for the Eastern District of Virginia
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-2025 Term. Enclosed please find my resume, a writing sample, my law school transcript, and letters of recommendation from Professors Young, Tsesis, and Mortellaro. Thank you for your consideration of my application.

Sincerely,

Andrea Stein

ANDREA STEIN

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EDUCATION

The George Washington University Law School — **Washington, DC**
Juris Doctor Candidate — Expected May 2024
GPA: 3.708
Journal: *The George Washington International Law Review*
Skills Board: GW Law Moot Court Board (Social Chair)
Activities: Labor and Employment Law Society; 1L Negotiations, Mediations, and Mock Trial Competitions Participant
Honors: George Washington Scholar (top 1%-15% of class as of Fall 2022); Dean's Recognition for Professional Development

The University of Florida — **Gainesville, FL**
Bachelor of Arts, summa cum laude, in Business Administration (three years) — May 2020
Honors Thesis: *The Accuracy of International Economists' Predictions on Brexit*
Honors: President's Honor Roll and Dean's List Recipient

EXPERIENCE

Holland & Knight LLP — **Washington, DC**
Summer Associate — May 2023 – Present

The United States District Court for the District of Columbia — **Washington, DC**
Judicial Intern for The Honorable Rudolph Contreras — January 2023 – April 2023
- Drafted orders and opinions responding to motions related to sentence reduction, protective orders, and employment discrimination
- Cite checked opinions related to suppression of evidence, Administrative Procedures Act, and Americans with Disabilities Act

The George Washington University Law School — **Washington, DC**
Research Assistant for Professor Kathryne Young — January 2023 – Present
- Code data and identify themes from answers to a survey for an access to justice project

Torts Teaching Assistant for Professor Alexander Tsesis — September 2022 – December 2022
- Assisted professor by reviewing exams and held exam review sessions to respond to student questions

The United States Department of Justice, Civil Division, Fraud Section — **Washington, DC**
Law Student Intern — August 2022 – November 2022
- Researched civil procedure issues to assist with an active healthcare fraud litigation under the False Claims Act
- Analyzed, substantiated, and cite checked cases attorneys use in motions for federal court
- Presented on a case on interlocutory appeal questioning whether converting reimbursement funds would create liability under the False Claims Act

United States Securities and Exchange Commission, Division of Enforcement — **Washington, DC**
Scholars Program Legal Intern — May 2022 – July 2022
- Researched various federal securities law issues to assist with the disbursement of a multi-million-dollar fund
- Drafted memoranda and orders recommending action for settlement distributions to injured investors

Stein & Stein, P.A. — **Palm Beach, FL**
Legal Assistant — August 2020 – July 2021
- Drafted motions to dismiss, complaints, answers, motions for sanctions, and other documents to be filed in court and with the Financial Industry Regulatory Authority (FINRA)

INTERESTS

- Cycling, watching musical theater, painting by numbers, reading thriller novels

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Date Issued: 17-MAY-2023

Record of: Andrea L Stein

Page: 1

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Admit Term: Fall 2021

Issued To: ANDREA STEIN
ANDREASTEIN@LAW.GWU.EDU

REFNUM:3701538

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
Law School			
Law			
LAW 6202	Contracts Maggs	4.00	A
LAW 6206	Torts Tsesis	4.00	B
LAW 6212	Civil Procedure Schaffner	4.00	B+
LAW 6216	Fundamentals Of Lawyering I Mortellaro	3.00	A
Ehrs 15.00	GPA-Hrs 15.00	GPA	3.556
CUM 15.00	GPA-Hrs 15.00	GPA	3.556
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Spring 2022			
Law School			
Law			
LAW 6208	Property Tuttle	4.00	A-
LAW 6209	Legislation And Regulation Roberts	3.00	B
LAW 6210	Criminal Law Braman	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	B+
LAW 6217	Fundamentals Of Lawyering II Mortellaro	3.00	A
Ehrs 16.00	GPA-Hrs 16.00	GPA	3.604
CUM 31.00	GPA-Hrs 31.00	GPA	3.581
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
Law School			
Law			
LAW 6230	Evidence Young	3.00	A+
LAW 6250	Corporations On Gabaldon	4.00	A
LAW 6644	Moot Court - Van Vleck	1.00	CR
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6671	Government Lawyering Platt	2.00	A+
Ehrs 13.00	GPA-Hrs 9.00	GPA	4.185
CUM 44.00	GPA-Hrs 40.00	GPA	3.717
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2023			
LAW 6218	Prof Responslbty/Ethic On	2.00	A-
LAW 6400	Administrative Law	3.00	A
LAW 6518	Govt Contracts Overview On	1.00	CR
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	3.00	CR
LAW 6676	Mediation/Alternative Disp Res	3.00	B+
Ehrs 12.00	GPA-Hrs 8.00	GPA	3.667
CUM 56.00	GPA-Hrs 48.00	GPA	3.708
Fall 2022			
Law School			
Law			
LAW 6657	Int'L Law Review Note Credits In Progress:	1.00 1.00	----------
Spring 2023			
LAW 6657	Int'L Law Review Note Credits In Progress:	1.00 1.00	----------
Fall 2023			
LAW 6268	Employment Law	2.00	----------
LAW 6362	Adjudicatory Criminl Procedure	3.00	----------
LAW 6380	Constitutional Law II	4.00	----------
LAW 6659	International Law Review	1.00	----------
LAW 6683	College Of Trial Advocacy	3.00	----------
LAW 6711	Civil Access To Justice Clinic	2.00	----------
	Credits In Progress:	15.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G25346241
Date of Birth: 29-MAR

Date Issued: 17-MAY-2023

Record of: Andrea L Stein

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	48.00	178.00	3.708
OVERALL	56.00	48.00	178.00	3.708

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with tremendous enthusiasm to recommend Andrea Stein for a clerkship in your chambers. Andrea took my Evidence course in Fall 2022, and was a standout student in class, with on-point comments and a collaborative spirit. She also received one of the two highest grades in the entire 80-person class. I rarely give out an A+, but her standout exam deserved it. She excelled on the multiple choice questions (relatively straightforward applications of evidence law), the hypothetical questions (very complex issue-spotters), and the policy question (which required in-depth application of the law to a real-world issue). It is unusual, to say the least, for a student to do so well on all three types of writing and thinking, especially under tight time pressure.

Impressed by her oral performance in class and her written performance on the exam, I invited Andrea to apply for a position as my research assistant. I have gotten to know her better in that capacity, and have entrusted her with coding highly sensitive qualitative data about people's experiences with civil justice problems. Andrea has been an ideal research assistant because she is excellent both at working independently and at collaborating with her fellow RAs (indeed, I have been pleased to watch her emerge as a gentle leader among the group). I also appreciate that she is willing to ask questions when she does not understand something, and that she has an extremely precise mind and wants to get details right. I am confident that these qualities, which make her a standout RA, would also make her an excellent addition to any chambers. Perhaps even more importantly, I have found that although she takes her work seriously, Andrea does not take herself overly seriously—meaning that not only does she have a sense of humor, but she is wonderful at accepting feedback and constructive criticism. This quality, in particular, has impressed me because I have met so many law students who struggle with it. Andrea does not, and it makes her a real joy to teach and mentor.

I have had the opportunity to talk with Andrea on several occasions about her goals and interests. One of the experiences from which she has learned the most is her work in the U.S. District Court for the District of Columbia, where she has been a Judicial Intern for The Honorable Rudolph Contreras for the past four months. In that capacity, she has cite-checked opinions, written orders, and researched a wide variety of issues, ranging from sentencing to the Americans with Disabilities Act. Andrea has enjoyed the opportunity to engage with a variety of legal questions during the internship, and appreciates the intense intellectual atmosphere of chambers. She will be a summer associate at Holland & Knight, LLP, this summer, but I believe her longer-range plan includes work in the government, for which she will be extremely well-suited. Indeed, her past internships as a law student in addition to her judicial internship were both spent in the federal government; she was in the Scholars Program at the SEC's Enforcement Division, and also worked in the Fraud Section of the Civil Division at the Department of Justice.

Over her time in law school, Andrea has sought out and exceled in many different activities and experiences. For example, she is on the law school's Moot Court Board, is a member of The George Washington International Law Review, and participates in Mock Trial and the Labor and Employment Law Society. She has also received the Dean's Award for Professional Development, and has worked as a Teaching Assistant for Professor Alexander Tsesis in his Torts class. This range of commitments is impressive for its number, but even more so for its range. It has allowed Andrea to cultivate a broad variety of strengths that will serve her well as a lawyer, including her oral advocacy skills (both trial and appellate), her written skills, her analytical skills, her research skills, and her interpersonal skills as a collaborator and negotiator. Andrea's ability to rise to challenges is also evidenced in her GPA, which has risen every semester she has been in law school. Her first semester, she performed solidly enough, with a 3.55 GPA. But this past fall, she received above a 4.0, earning an A+ in Evidence and in Government Lawyering. For this outstanding performance, she was named a George Washington Scholar (ranked in the top 1%–15% of students in her class).

Another reason I recommend Andrea so confidently is that even though she works very hard, her approach is low-key and well-balanced. She can keep a cool head when a situation is intense and is not stymied by setbacks. In sum, Andrea is precisely the sort of clerk I would want in chambers. I am happy to elaborate further if you think it would be useful. My cell number is (650) 862-5194. Please feel free to email or call any time.

Sincerely yours,

Kathryne M. Young
Associate Professor of Law
The George Washington University Law School

May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Andrea Stein is one of the most gifted and dedicated students I have had the pleasure of teaching, and as her 1L legal writing and Fundamentals of Lawyering professor at GW Law, I strongly endorse her judicial clerkship application. She has demonstrated a gift for legal writing since the first assignment she turned in for our class, yet she has never rested on her laurels; she enthusiastically seeks out opportunities to grow as a writer and aspiring lawyer, and the talents she will bring to your chambers are tremendous.

What impresses me most about Andrea are her sophisticated legal analysis skills and impeccable work ethic. She turned in some of the most substantial paper drafts of anyone in the class, and she poured an incredible amount of energy into perfecting her work. Andrea is also a pleasure to teach; not only is she attentive, punctual, and easy to get along with, she is the most engaged student I ever taught at GW Law. She is seen by her peers as a leader in group exercises, and she asks thoughtful questions and meaningfully contributes to classroom discussions—demonstrating that she deeply engages with the material and is eager to learn. Her efforts have clearly paid off, because during her time as my student, she turned in one of the most impressive student legal memos and briefs in the class: polished, well-cited, and supported by deeply fact-sensitive and legally nuanced arguments.

Andrea's performance has been extraordinary, and she is easily one of the top 10 students I have taught at GW Law. Her achievements are hardly surprising. She has had a fervent desire to practice law for years, and I have no doubt she will earn additional accolades as she continues to use to her impressive legal analysis and writing skills. Her passion and persistence in working in this profession make her an asset to any employer fortunate enough to have her.

Andrea's robust lawyering skills, professionalism, and dedication ensure she will be an incredible addition to your chambers. I recommend, unequivocally, that she be hired as a clerk.

Please reach out to me if you have any questions or would like to discuss Andrea's application further. Thank you.

Sincerely,

Stephen Mortellaro
Visiting Associate Professor, The George Washington University Law School (2021-2022)
Visiting Clinical Assistant Professor
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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

ALEXANDER TSESIS
VISITING PROFESSOR OF LAW (2021-2023)
&
PROFESSOR AND SIMON CHAIR IN CONSTITUTIONAL LAW
LOYOLA UNIVERSITY SCHOOL OF LAW-CHICAGO
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Law School

April 3, 2023

Re: Recommendation for Judicial Clerkship
Andrea Stein

To whom it may concern,

I am writing to highly recommend Andrea Stein to be a judicial clerk in you chambers. She is an excellent candidate with a great academic and employment background. Andrea has been both my student and teaching assistant. In my experiences, she has always been diligent, precise, articulate, interested, and engaged. Andrea has a sharp mind with great insights. She is curious to learn and diligent in her efforts. She is capable, willing, and able to understand complex tasks and intricate judicial assignments. She is a creative thinker who exerts her full effort to the task at hand. When necessary, she is wise enough to ask poignant questions necessary for critical comprehension.

She is not only a competent and intelligent person, Andrea is also a role model to other students. Even as a student in my Torts class she asked penetrating questions that helped other students understand assigned cases. Then, the following academic year, as a teaching assistant she was extraordinary in her ability to articulate civil law to students who were enrolled in my Torts class. My courses benefited from her engagement. Andrea was always prepared, eager to learn, willing to clarify her understanding through secondary sources, great at working with a team, and respectful about the rule of law. I enjoyed engaging with her in class and during office hours because she always demonstrated a diligence in her preparation of assignments. She is precise in her understanding of the readings, competent at analyzing doctrine, and capable of articulating key points.

As you'll see from her resume, Andrea has a strong professional background that sets her on a path to success. Her depth of personality and breadth of interests are evident from her work experience. She was ambitious enough to work both for the U.S. Securities and Exchange Commission and the U.S. Department of Justice. Moreover, and she is currently a judicial intern for Judge Contreras of the District Court for the District of Columbia.

Throughout the two years I've known Andrea, she demonstrated a commitment to excellence. I have no doubt that she has the skills necessary, the competence, diligence, and work-ethic it takes to be a great judicial law clerk. She will make a first-rate attorney.

Feel free to contact me with any questions.

Sincerely,

Alexander Tsesis
George Washington University Law School (2021-2023)
Visiting Professor of Law · 202-994-2204 · atsesis@gwu.edu

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Professor and Raymond & Mary Simon Chair in Constitutional Law

- Most recent book: *Free Speech in the Balance* (Cambridge Univ. Press 2020)

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The attached writing sample is an appellate brief I wrote for my 1L legal research and writing class. I wrote the brief on behalf of the United States. The United States appealed to the Circuit Court and argued that the court should reverse the District Court's decision to grant the Defendant's Motion to Suppress Evidence. The brief analyzes (I) whether the clothing exception is an exigent circumstance under the Fourth Amendment, and (II) whether the clothing exception was lawfully exercised in this case. The appellate brief's cover page, table of authorities, certificate of compliance, and certificate of service have been omitted for the purpose of this writing sample. Additionally, this sample includes minimal edits from my legal research and writing professor.

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STATEMENT OF THE ISSUES

1. Under the Fourth Amendment's warrant requirement, does an officer's warrantless entry into a partially clothed arrestee's home, for the purpose of retrieving clothes for the arrestee, constitute an exigent circumstance?
2. Was Officer Roddar's entry into Stefanie Michaels's home to retrieve a shirt and shoes for Michaels, who was only wearing a red bikini on top and socks, a proper use of the clothing exception when there were debris on the ground, a rocky terrain, and chilly weather?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On December 8, 2021, Officer Trinity Roddar of the Ellijay City Police Department arrested Stefanie Michaels for felony possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 3. Michaels was indicted by a grand jury in the United States District Court for the Northern District of Georgia. R. at 12. On December 17, 2021, pursuant to the Federal Rules of Criminal Procedure 12(b)(3)(C), Michaels filed a Motion to Suppress Evidence to exclude the evidence seized by Officer Roddar while inside Michaels's home. R. at 13. The District Court granted the motion to suppress on February 25, 2022. R. at 19. On February 28, 2022, the Government filed Notice of Appeal to this Court regarding the District Court's order granting Michaels's Motion to Suppress Evidence. R. at 20.

II. STATEMENT OF FACTS

On December 8, 2021, at approximately 4:30 p.m., Officers Trinity Roddar and Alex Sanchez responded to a 911 call from Nora Sheehan in the Mountainview community of Ellijay, Georgia. R. at 3. Sheehan claimed that an explosion erupted from Michaels's trailer home which

she shared with Lewis Ricciardo. R. at 5. Officer Roddar knew of Michaels and her involvement in previous drug activities. R. at 3. She suspected that the sound could have been from an explosion fueled by chemicals to manufacture methamphetamine. *Id.* To get to the trailer, officers parked their car on the community's only drivable road and walked down a heavily wooded trail. R. at 3, 5. The trail was unpaved, narrow, very rocky, and uneven. R. at 3, 4. When the officers responded to the call, the weather was a chilly 51-degrees Fahrenheit, and as it was getting dark, it was dropping quickly. R. at 5, 10. Within the hour of the 911 call, the temperature dropped five degrees. R. at 10.

After walking about 900 feet, Officer Roddar recognized Michaels standing amidst the contents of the exploded trailer. R. at 4. Officer Roddar told Michaels to not move. R. at 6. One of the trailer's walls had blasted open, leaving dangerous bottles containing chemicals and debris scattered on the ground. R. at 4. While looking at the scene, Officer Roddar briefly expressed disapproval of the explosion's mess. R. at 5. After Officer Roddar recognized bottles containing chemicals needed to manufacture methamphetamine, she believed there was probable cause to arrest Michaels and Ricciardo for violating federal drug laws. R. at 4.

At the time of the arrest, Michaels was not wearing a shirt or shoes. *Id.* She was only wearing a red bikini top merely held up by a tie around her neck and socks with rubber grippers on the soles. R. at 4, 7. With the temperature quickly dropping and Michaels having to walk up the long, rocky path in the dark, Officer Roddar believed that Michaels needed proper clothing and footwear to protect her body from catching a chill and her feet from injury. R. at 4. Also, Officer Roddar thought Michaels would not want to walk in public without a shirt. *Id.*

Officer Roddar, under the belief that entering the trailer to obtain shoes and a shirt for Michaels was a sufficient exigency, entered Michaels's trailer. *Id.* Once inside the trailer, Officer

Roddar proceeded directly to the trailer's only bedroom to promptly retrieve clothes. *Id.* Once she entered the bedroom, she saw a loaded nine-millimeter handgun lying in plain view on the floor. *Id.* Since Officer Roddar knew Michaels was a convicted felon, she knew it was illegal for Michaels to possess a firearm, and she seized the gun. *Id.* After seizing the gun, Officer Roddar retrieved a sweater and a pair of shoes from Michaels's ajar closet and swiftly left the trailer. *Id.* Michaels put on the clothing items, and the officers and arrestees made the dark, chilly trek back to the patrol car. *Id.*

III. STANDARD OF REVIEW

When reviewing a defendant's motion to suppress evidence, this Court reviews the District Court's legal conclusions and its application of law to facts *de novo*. *See United States v. Hollis*, 780 F.3d 1064, 1068 (11th Cir. 2015); *United States v. Alexander*, 935 F.2d 1406, 1408 (11th Cir. 1988). The motion standard for a motion to suppress evidence is pursuant to the Federal Rules of Criminal Procedure 12(b)(3)(C). Therefore, if the search or seizure was unlawful under the Fourth Amendment, any evidence obtained from the search must be excluded. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The Government bears the burden to prove by the preponderance of the evidence that a warrantless search was reasonable. *See United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983); *United States v. Waldrop*, 404 F.3d 365, 368 (5th Cir. 2005).

SUMMARY OF THE ARGUMENT

This is a case that allows the Eleventh Circuit to hold that the clothing exception is an exigent circumstance under the Fourth Amendment. The implication of this holding will allow officers to protect arrestees from the various safety and dignitary harms posed to them. The clothing exception fits into the exigency doctrine because it aims to protect individuals from

safety hazards. A plurality of courts has correctly authorized the clothing exception because upon their arrests, unclothed arrestees may be exposed to dangers on the ground, including debris or unsafe terrain, or adverse weather, including cold temperatures. *See United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000). To prevent an arrestee from sustaining injuries on his feet or getting ill because of his lack of clothing, an officer's ability to exercise the clothing exception will ultimately keep the arrestee safe.

Like other exigencies, the clothing exception will be exercised only when there is an objectively reasonable basis to enter a home. *See Michigan v. Fisher*, 558 U.S. 45, 47 (2009). The clothing exception does not have to be exercised solely in life-threatening instances because not all objectively reasonable bases are life-threatening. *See id.* at 49. Moreover, the clothing exception protects arrestees's human dignity. Courts have authorized officers to exercise the clothing exception to protect arrestees from the possible dignitary harm of being partially clothed or unclothed in public. *See United States v. Nascimento*, 491 F.3d 25, 50 (1st Cir. 2007). Also, the legal system has typically equated human dignity with being clothed. *See Tagami v. City of Chicago*, 875 F.3d 375, 377 (7th Cir. 2017).

In this case, the factual circumstances indicate that Officer Roddar properly exercised the clothing exception. When approached by the police, Michaels was wearing no shirt or shoes and was standing amidst debris from the trailer explosion. To return to the patrol car, Michaels would have to walk 900 feet on a rocky, unpaved trail. Both the explosion debris and the trail posed a risk to Michaels's feet. At the time of the arrest, the weather was about 50-degrees Fahrenheit and dropping quickly. On the walk to the patrol car, Michaels was going to be exposed to the weather for an extended period of time. Since Michaels was not wearing a proper shirt, there was a risk of her catching a chill. The safety hazards created from the ground and weather created an

objectively reasonable basis for Officer Roddar to exercise the clothing exception. Since there was an objectively reasonable basis for Officer Roddar to enter the home and the record indicates her entry was only to obtain clothing, Office Roddar did not enter pretextually. For the foregoing reasons, this Court should reverse the District Court's ruling granting Michaels's Motion to Suppress.

ARGUMENT

The District Court erred in granting Michaels's Motion to Suppress because the clothing exception is an exigent circumstance under the Fourth Amendment. Further, the factual circumstances, including the terrain and adverse weather, indicate that Officer Roddar properly exercised the clothing exception. Although the circuits are split as to whether the clothing exception exists under the Fourth Amendment, this court should join the plurality of circuits that have held that the clothing exception is an exigency because it protects arrestees from safety hazards and upholds human dignity. Officer Roddar lawfully exercised the clothing exception because the ground and weather posed an objective safety threat to Michaels. Therefore, this Court should reverse the District Court's ruling granting Michaels's Motion to Suppress Evidence.

I. THE CLOTHING EXCEPTION EXISTS AS AN EXIGENT CIRCUMSTANCE UNDER THE FOURTH AMENDMENT BECAUSE IT PROTECTS ARRESTEES FROM SAFETY HAZARDS, IS BASED ON AN OBJECTIVELY REASONABLE STANDARD, AND SAFEGUARDS HUMAN DIGNITY.

The Fourth Amendment allows "the right of people to be secure in their … houses … against unreasonable searches and seizures." U.S. Const. amend. IV. Police officers are allowed to enter a home if they have a search warrant or if an exigent circumstance exists. *See Steagald v. United States*, 451 U.S. 204, 212 (1981). Exigent circumstances under the Fourth Amendment are objective reasons for police officers to enter a home without a warrant. *See Brigham City v.*

Stuart, 547 U.S. 398, 403 (2006). Examples of exigent circumstances include the need of police officers to render emergency assistance or aid, pursue a fleeing felon, or prevent the imminent destruction of evidence. *See Kentucky v. King*, 563 U.S. 452, 460 (2011). A foundational element of the exigency doctrine is that it aims to protect individuals from threats to safety. *See Fisher*, 558 U.S. at 47 (quoting *Brigham*, 547 U.S. at 403).

A circuit split has developed as to whether the clothing exception is an exigent circumstance under the Fourth Amendment. The United States Court of Appeals for the First, Second, Fourth, Fifth, and Tenth Circuits have correctly recognized that the Fourth Amendment permits an officer's warrantless entry into a home to obtain clothes for an arrestee. *See Nascimento*, 491 F.3d at 50; *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977); *Gwinn*, 219 F.3d at 333; *United States v. Wilson*, 306 F.3d 231, 241 (5th Cir. 2002); *United States v. Butler*, 980 F.2d 619, 621 (10th Cir. 1992). The United States Court of Appeals for the Sixth and Ninth Circuits have erroneously held that the clothing exception does not exist. *See United States v. Kinney*, 638 F.2d 941, 945 (6th Cir. 1981); *United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983).

The clothing exception fits well in the exigent circumstances doctrine because it closely follows the emergency aid exception. The emergency aid exception provides that officers are allowed to enter homes to "assist persons who are seriously injured or threatened with such injury." *See Fisher*, 558 U.S. at 47 (quoting *Brigham City*, 547 U.S. at 403). Like the emergency aid exception, the clothing exception justifies officers to enter homes to retrieve clothing for arrestees who are threatened with possible injuries. *See Gwinn*, 219 F.3d at 333. The clothing and emergency aid exceptions share the common foundation that officers are permitted to enter

homes with the goal of protecting an individual, whether that be an occupant or an arrestee. *See id.*

Courts have held that police officers are authorized to retrieve clothing for an arrestee when he is exposed to safety hazards like adverse weather, debris on the ground, or an unsafe terrain. *See Gwinn*, 219 F.3d at 333 (holding that arresting officer was authorized to enter into defendant's home to obtain his shirt and boots because there was a substantial risk of defendant sustaining cuts or other injuries to his bare feet and a substantial risk of chill if defendant did not wear a shirt); *Wilson*, 306 F.3d at 241 (determining that the threat of injury from walking on public sidewalks and streets placed a duty on law enforcement officers to obtain appropriate clothing for arrestee who was only in his underwear).

If this Court does not allow police officers to exercise the clothing exception, then an indefinite number of arrestees will be subject to bodily injuries. Without the clothing exception, officers would not be able to procure footwear for an arrestee even if the arrestee had to walk across sharp objects to get to a patrol car. In *Butler*, upon his arrest, the barefoot defendant would have had to walk across glass, beer cans, and other litter. *See Butler*, 980 F.2d at 621. This created a "legitimate and significant" safety threat to the defendant; therefore, exercising the clothing exception to obtain his shoes was necessary to protect him from sustaining possible abrasions to his feet. *See id.* The clothing exception aims to protect arrestees like the defendant in *Butler* from threatening ground hazards.

Further, if police officers cannot secure clothing for arrestees, then they will be exposed to inclimate or adverse weather without proper clothing. The First and Second Circuits have found that police officers are justified in exercising the clothing exception for this reason. *See Nascimento,* 491 F.3d at 50 (holding that the New England climate in December justified

officers's entry into defendant's home, who was only wearing his underwear, to have a more complete wardrobe); *United States v. Titus*, 445 F.2d 577, 579 (2d Cir. 1971) (finding that FBI agents were bound to find clothing for nude defendant before taking him to the agency's headquarters on a cold December night). Neither *Nascimento* nor *Titus* explicitly mention the safety risk of being unclothed in cold weather conditions; however, *Gwinn* found that cold weather threatened the defendant with a risk of catching a chill which warranted the officer's use of the clothing exception. *See Gwinn*, 219 F.3d at 333.

The clothing exception, like the emergency aid exception, relies on an "objectively reasonable basis" for police entry into a home that mitigates concerns of pretext, abuse of discretion, or error. *See Fisher*, 558 U.S. at 47. In *Brigham City*, the Court found that there was an "objectively reasonable basis for believing that the injured [person] … might need help." *Brigham City*, 547 at 406. In *Brigham City*, officers who were outside a home witnessed a juvenile punch an adult in the face through a window. *See id.* at 401. The adult recoiled to the sink and spat blood. *See id.* at 406. Officers's exercise of the emergency aid exception was justified because a punch to the face was an objective reason for officers to believe that the individual needed help. *See id.*

The clothing exception also applies in this way. Just as when applying the emergency aid doctrine, officers can properly exercise the clothing exception not based on their subjective interpretation of a danger, rather an objective reason that procuring clothing might protect the arrestee from danger. *See Gwinn*, 219 F.3d at 334 (finding that the officer was presented with an objective need to procure footwear and a shirt to protect defendant from cutting his feet and of a chill). If the clothing exception is adopted under the exigency doctrine, it does not need to be narrowed to only being exercised when there is an extreme, life-threatening, possible injury to an

arrestee because not all objectively reasonable hazards are life-threatening. *See Fisher*, 558 U.S. at 49 (citing *Brigham City*, 547 U.S. at 406) (discussing officers's entry in *Brigham City*, to help the individual punched in the face, was authorized even though the injury was not life-threatening).

While it is not always guaranteed that the clothing exception will be exercised on this standard, the legal system is equipped to find when an officer's entry is due to pretext, abuse of discretion, or error by looking at whether the basis for entry was objective and the record of the officer's actions. *See United States v. Casper*, 34 F. Supp. 3d 617, 624 (E.D. Va. 2014) (holding that the officer's entry into defendant's motel room to procure fully-dressed defendant a coat, when he was only going to be exposed to mild weather for a short period of time, was pretextual because there was not an objective need for the coat); *Gwinn*, 219 F.3d at 334 (finding no evidence from the record of a pretextual entry when the officer entered into defendant's home to procure a shirt and shoes for defendant). Further, the probability for a police officer exercising the clothing exception based on pretext, abuse of discretion, or error is low. None of the leading circuit court cases that hold on the clothing exception have found entry due to pretext, abuse of discretion, or error. *See Nascimento*, 491 F.3d at 50; *Di Stefano*, 555 F.2d at 1101; *Gwinn*, 219 F.3d at 333; *Wilson*, 306 F.3d at 241; *Kinney*, 638 F.2d at 945; *Whitten*, 706 F.2d at 1015; *Butler*, 980 F.2d at 621.

An officer's exercise of the clothing exception upholds an arrestee's human dignity because what he is wearing upon his arrest could differ from what he would want to wear in public. In *Nascimento*, the First Circuit held that officers should be able to retrieve clothing for an arrestee because it favors an arrestee's human dignity. *See Nascimento*, 491 F.3d at 50 (finding that officers upheld defendant's human dignity when they entered into defendant's home

to retrieve clothing for defendant, who was only in his underwear, because individuals do not typically wear underwear in public). The Sixth Circuit has erroneously and implicitly held that dignitary harm does not merit exercising the clothing exception. *See Kinney*, 638 F.2d at 945. In *Kinney*, the court held that the defendant's partially clothed condition *in front of a crowd of spectators* did not merit exercising the clothing exception. *See id.* (emphasis added). However, the defendant in *Kinney* was not unclothed; rather, his shirt was unbuttoned. *See id.* at 943. Therefore, the Sixth Circuit's holding does not properly illustrate the substantial need of the clothing exception for human dignity concerns.

Further, many states and cities have enforced public indecency statutes and public nudity ordinances. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991); *Tagami*, 875 F.3d at 377. The lawsuit in *Tagami* involved a Chicago public nudity ordinance which made intentional, public exposure of genitals or breasts illegal. *See Tagami*, 875 F.3d at 377. While public nudity ordinances are typically created to prohibit individuals from intentionally exposing themselves, their purposes shed light on how the legal system generally equates human dignity with being clothed. If this Court chooses not to adopt the clothing exception, every time an unclothed individual is arrested, and an officer cannot retrieve clothing for her, the arrestee's body will be forcefully exposed in a manner that is inconsistent to typical public decency. Therefore, this Court should adopt the clothing exception as an exigent circumstance under the Fourth Amendment because it vitally protects the arrestee from safety hazards and dignitary harm.

II. OFFICER RODDAR'S EXERCISE OF THE CLOTHING EXCEPTION WAS PROPER BECAUSE THE DEBRIS ON THE GROUND, ROCKY TERRAIN, AND CHILLY WEATHER THREATENED MICHAELS'S SAFETY, AND OFFICER RODDAR DID NOT ENTER THE TRAILER DUE TO A PRETEXT.

The clothing exception applies when officers need to procure footwear for arrestees to protect them from debris and glass on the ground or from the hazards posed by public sidewalks

and roads. *See Butler*, 980 F.2d at 622 (finding that glass, beer cans, and other debris authorized officers to exercise the clothing exception to obtain footwear for the barefoot defendant because the hazards on the ground created a "legitimate and significant" threat to defendant's feet); *Gwinn*, 219 F.3d at 333 (holding that officer's entry into defendant's home to obtain his boots and a shirt was lawful because there was a substantial risk of defendant sustaining cuts to his feet following his arrest); *Wilson*, 306 F.3d at 241 (authorizing officers to enter arrestee's home and exercise the clothing exception because even though arrestee was not surrounded by broken glass on the ground, the hazards of public sidewalks and streets posed enough of a threat of injury to arrestee's feet).

The clothing exception is lawfully exercised in instances where officers need to obtain clothes for an arrestee to protect him from weather conditions, including cold weather. *See Nascimento*, 491 F.3d at 50 (finding that the New England climate on a December evening justified officers obtaining a more complete wardrobe for defendant, who was clad only in his underwear); *Titus*, 445 F.2d at 579 (holding that FBI agents properly exercised the clothing exception because they were bound to find defendant clothing to protect him from the weather on a cold, December night rather than take him to FBI headquarters nude); *Casper*, 34 F. Supp. 3d at 624 (determining that it was unlawful for officers to exercise the clothing exception to obtain defendant's coat because defendant was fully clothed, and the weather would not have posed a risk of injury to defendant on his brief walk from his motel room to the police car).

Like other exigencies, the clothing exception applies when officers do not enter the home because of a pretext. *See Gwinn*, 219 F.3d at 332 (justifying officer's reentry into defendant's home to exercise the clothing exception because there was no suggestion from the record that the officer entered due to a pretext nor was the officer there for any purpose other than finding

defendant boots and a shirt); *Butler*, 980 F.2d at 622 (finding that a "legitimate and significant" safety threat to barefoot defendant from broken glass on the ground *and* no evidence in the record that the concern for defendant's health and safety was pretextual meant that officers lawfully exercised the clothing exception) (emphasis added). If an officer exercises the clothing exception when there is not an objectively reasonable basis for doing so, the entry could point to a pretext. *See Casper*, 34 F. Supp. 3d at 624 (determining that officer's exercise of the clothing exception, to obtain a coat, was pretextual because defendant was wearing shoes, blue jeans, and a shirt, and defendant would not need a coat in mild mid-50-degree Fahrenheit weather during his brief walk from his motel room to patrol car).

Here, the contents of the exploded trailer and the narrow, very rocky, uneven, 900-foot trail posed a risk of injury to Michaels's feet. When Officer Roddar approached Michaels, she was standing amidst scattered debris from the exploded trailer and would possibly have to walk across these contents when going to the patrol car. In *Butler*, the court found that glass, beer cans, and debris created a "legitimate and significant" safety risk to the barefoot defendant who would have had to walk across those objects. *See Butler*, 980 F.2d at 622. Therefore, to prevent defendant's feet from sustaining abrasions, the officers were authorized to enter the defendant's home to procure him footwear. *See id.* Like the officers in *Butler*, Officer Roddar was authorized to retrieve shoes for Michaels to prevent her feet from sustaining abrasions when walking across the explosion's debris. While the defendant in *Butler* was barefoot and Michaels was wearing socks, Michaels's socks would not properly protect her feet from sustaining cuts from possibly sharp debris that could pierce the socks's cloth. *See id.* at 21.

Not only did the contents from the explosion pose a risk of injury to Michaels's feet, but the 900-foot trail also threatened Michaels's safety. In the arrest report, Officer Roddar described

the trail to get to Michaels's trailer as heavily wooded, very rocky, and uneven. In fact, Sheehan, when she first led officers down the trail, warned the officers to watch their step. In *Wilson*, the court held that the typical hazards from walking on public sidewalks and streets without shoes created enough of a safety hazard to allow officers to retrieve footwear for the defendant. *See Wilson*, 306 F.3d at 241. In this case, the hazard posed to Michaels's feet was greater than the hazard posed to the *Wilson* defendant's feet. To get back to the patrol car, Michaels was going to have to walk on an *unpaved* trail in a heavily wooded area as it was getting dark. It is clear that the trail posed a substantial safety hazard to Michaels's feet because it was probable that she would step on sharp rocks and branches and likely sustain cuts. While Michaels was wearing socks, the socks undoubtedly would not protect her feet from when she stepped on sharp objects like a pair of shoes would. Therefore, Officer Roddar's exercise of the clothing exception to procure shoes for Michaels was justified because the rocky trail posed a substantial safety threat to her feet.

Further, Michaels was susceptible to catching a chill on the walk back to the patrol car because the temperature was already chilly and dropping quickly. In *Nascimento* and *Titus*, the courts authorized officers's entries to obtain clothing to protect the defendants from the cold weather. *See Nascimento*, 491 F.3d at 50; *Titus*, 445 F.2d at 579. While the defendant in *Nascimento* was clad only in his underwear, and the defendant in *Titus* was nude, Michaels's small, red bikini top and shorts were not enough to keep her warm and prevent her from catching a chill on the walk back to the patrol car. *See Nascimento*, 491 F.3d at 50; *Titus*, 445 F.2d at 579. In fact, when comparing body coverage of Michaels and the *Nascimento* defendant, Michaels's shorts comparatively cover her body like a pair of men's underwear would cover the *Nascimento* defendant. Therefore, Michaels's small bikini top would not add much more coverage to the total

surface area of her body compared to the *Nascimento* defendant. While both *Nascimento* and *Titus* took place in more northern and likely chillier settings, the weather in this case still posed an objective safety risk because Michaels was going to spend a prolonged amount of time exposed to the chilly weather, without sunlight, when walking back to the patrol car. Therefore, Officer Roddar's entry into Michaels's home was justified because she needed to retrieve a top that kept Michaels protected from the chilly, dropping temperatures.

Officer Roddar did not enter Michaels's home pretextually despite her expressing slight contempt for the area surrounding the home and knowing of Michaels's record. The entry was not pretextual because the safety hazards from the explosion's debris, rocky terrain, and chilly weather created an objectively reasonable basis to enter the home. In *Casper*, the arresting officer's exercise of the clothing exception was unreasonable because the weather was relatively mild; the defendant was only going to be exposed to the weather briefly while walking from his motel room to the patrol car; and the defendant was already clothed in shoes, blue jeans, and a shirt. *See Casper*, 34 F. Supp. 3d at 64. Therefore, the officer's exercise of the clothing exception to obtain a coat for the defendant was clearly due to a pretext. In this case, unlike *Casper*, Officer Roddar's exercise of the clothing exception was reasonable because the weather was chilly and dropping, Michaels would be exposed to the weather for a prolonged period of time during the 900-foot walk back to the patrol car, and Michaels was wearing no shirt or shoes. These factual circumstances indicate that the entry was not due to a pretext.

While Officer Roddar previously knew of Michaels's criminal history, there is no suggestion from the record that she entered the trailer for any purpose other than quickly obtaining clothes for Michaels. In fact, Officer Roddar already had probable cause to arrest Michaels when she saw the bottles filled with chemicals used to manufacture methamphetamine.

When Officer Roddar entered the trailer, she moved swiftly through the home, only seized evidence that was in plain view directly in front of her, and retrieved clothing only from an ajar closet. She did not open any drawers or doors. The objectively reasonable basis for Michaels's need for clothing and Officer Roddar's behavior in the trailer indicate that she did not enter pretextually. Officer Roddar's exercise of the clothing exception was justified because debris from the explosion, rocky trail, and cold weather posed an objective safety risk to Michaels, and Officer Roddar did not enter the trailer as a pretext.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision to grant Michaels's Motion to Suppress Evidence.

Applicant Details

First Name	**Logan**
Middle Initial	**D**
Last Name	**Stein**
Citizenship Status	**U. S. Citizen**
Email Address	**lstein9@law.gwu.edu**
Address	**Address** Street **1800 N oak St, Apt 1015** City **Arlington** State/Territory **Virginia** Zip **22209** Country **United States**
Contact Phone Number	**7194875500**

Applicant Education

BA/BS From	**Colorado State University**
Date of BA/BS	**May 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**33%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**GW First Year Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tuttle, Robert
rtuttle@law.gwu.edu
(202) 686-7047
Lerner, Renée
rlerner@law.gwu.edu
(703) 528-8155
Wong, Candice
candice.wong@usdoj.gov
202-815-8549

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Logan Stein
1800 N Oak St. Apt. 1015, Arlington, VA | (719) 487-5500 • Lstein9@law.GWU.edu

June 5, 2023

The Honorable Jamar K. Walker
600 Granby St.,
Norfolk, VA 23510

Dear Judge Walker,

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a clerkship in your chambers for the 2024 - 2025 term. I have attached a resume, a transcript, and a writing sample. Enclosed as well are recommendations from Professors Tuttle, Professor Lerner, and Chief Assistant U.S. Attorney Candice Wong. Thank you for your time and consideration.

Respectfully,

Logan Stein

Logan Stein

1800 N Oak St. Apt. 1015 Arlington, VA | (719) 487-5500 • Lstein9@law.GWU.edu

EDUCATION

The George Washington University Law School — **Washington D.C.**
J.D., Thurgood Marshall Scholar (top 16-35%), GPA - 3.6 — Expected May 2024
Journal: Fed. Cir. Bar Journal Member
Activities: Mock Trial Board Assistant V.P. of Internal Training; Dean's Recognition for Professional Development; Research Assistant (Professor Robert Tuttle)

Colorado State University — **Fort Collins, CO**
B.A., *magna cum laude*, Sociological Criminology; Minor in Legal Studies — May 2020
Honors: Bob Lawrence Gateway to Law School Scholarship (2019- 2020); Dean's List (2016 -2020)

EXPERIENCE

Commonwealth's Attorney's Office — **Arlington, VA**
Summer Legal Intern - ThirdYear Practice Certificate — May 2023 - Current
Spring Legal Intern — Jan. 2023 - May 2023

- Drafted memos and motions on behalf of the Commonwealth in prosecution cases
- Analyzed case law and statutes to formulate arguments in court
- Assisted prosecutors in trial preparations and all stages of litigation

US Attorney's Office of D.C. — **Washington D.C.**
Summer Legal Intern - Violence reduction and trafficking offenses — Jun. 2022 - Aug. 2022
Fall Legal Intern - Fraud, Public Corruption, and Civil Rights — Sept. 2022 - Dec. 2022

- Researched legal issues while assisted AUSAs in litigation
- Drafted memos and motions to submit on behalf of the U.S. government to local and federal courts
- Interpreted federal and local statutes for charging and sentencing

Colorado State University Housing — **Fort Collins, CO**
Eco Leader; Community Coordinator — Aug. 2018 - May 2020

- Developed and facilitated educational campaigns for up to 950 recipients
- Wrote proposals for community events and budget allocation
- Developed and facilitated educational, social, and awareness events for campus community
- Responded on-call and drafted incident reports on roommate disputes, maintenance issues, and crisis situations

Fort Collins Public Defenders — **Fort Collins, CO**
Investigative Intern — Aug. 2019 - Dec. 2019

- Reviewed discover materials and communicated case status progress to client
- Investigated factual evidence included in discovery materials and external sources
- Interviewed witnesses and wrote summary memoranda to assist investigators and attorneys

District Court of Colorado - 8th Judicial — **Fort Collins, CO**
Judicial Intern - Magistrate Kent Spangler — Apr. 2019 - Aug. 2019

- Drafted orders, updated case files, and conducted statistical analysis on court efficiencies
- Facilitated Indian Child Welfare Act communication with tribal representatives
- Assisted in preparation of weekly dockets and observed courtroom proceeding

COMMUNITY SERVICE

Bread For the City, *Volunteer* (2021) — **Washington, D.C.**

- Assisted in sorting food materials and packing grocery bags for in-need members of the community
- Directed distribution efforts of grocery bags while abiding by COVID-19 protocol

Special Needs Peer Partner Program, *Mentor* (2015 - 2016) — **Colorado Springs, CO**

- Assisted special needs high school students in completing assignments and non-academic activities

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G29608111
Date of Birth: 14-OCT

Date Issued: 06-JUN-2023

Record of: Logan D Stein

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: LOGAN STEIN
LSTEIN9@LAW.GWU.EDU

REFNUM:5694209

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
Law School			
Law			
LAW 6202	Contracts Maggs	4.00	A-
LAW 6206	Torts Tsesis	4.00	A-
LAW 6212	Civil Procedure Peterson	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Mortellaro	3.00	B+
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.600			
CUM 15.00 GPA-Hrs 15.00 GPA 3.600			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2022			
Law School			
Law			
LAW 6208	Property Tuttle	4.00	A-
LAW 6209	Legislation And Regulation Roberts	3.00	A-
LAW 6210	Criminal Law Braman	3.00	B+
LAW 6214	Constitutional Law I Fontana	3.00	B
LAW 6217	Fundamentals Of Lawyering II Mortellaro	3.00	B+
Ehrs 16.00 GPA-Hrs 16.00 GPA 3.417			
CUM 31.00 GPA-Hrs 31.00 GPA 3.505			
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
Law School			
Law			
LAW 6360	Criminal Procedure Lerner	3.00	A+
LAW 6435	Trade&Sustainabledevelpmn t Law Bolin	2.00	A
LAW 6518	Gov. Contracts Overview On Tillipman	1.00	CR
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6671	Government Lawyering Platt	2.00	A
Ehrs 11.00 GPA-Hrs 7.00 GPA 4.143			
CUM 42.00 GPA-Hrs 38.00 GPA 3.623			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2023			
LAW 6218	Professional Responslbty/Ethic	2.00	A-
LAW 6230	Evidence	4.00	A
LAW 6380	Constitutional Law II	4.00	B
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	3.00	CR
Ehrs 13.00 GPA-Hrs 10.00 GPA 3.533			
CUM 55.00 GPA-Hrs 48.00 GPA 3.604			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Fall 2022			
Law School			
Law			
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
LAW 6657	Fed Circuit Bar Jrnl Note	1.00	----------
	Credits In Progress:	1.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

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GWid : G29608111
Date of Birth: 14-OCT

Date Issued: 06-JUN-2023

Record of: Logan D Stein

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6232	Federal Courts	3.00	----------
LAW 6234	Conflict Of Laws	3.00	----------
LAW 6362	Adjudicatory Criminl Procedure	3.00	----------
LAW 6378	Selected Topics In Crim. Law	3.00	----------
LAW 6652	Legal Drafting	2.00	----------
LAW 6660	Federal Circuit Bar Journal	1.00	----------
	Credits In Progress:	15.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	55.00	48.00	173.00	3.604
OVERALL	55.00	48.00	173.00	3.604

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

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Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM
All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS
Undergraduate Grading System

A, Excellent; *B*, Good; *C*, Satisfactory; *D*, Low Pass; *F*, Fail; *I*, Incomplete; *IPG*, In Progress; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *P*, Pass; *NP*, No Pass; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added: *A-, B+, B-, C+, C-, D+, D-*.
Effective Summer 1980: The grading symbols: *P*, Pass, and *NP*, No Pass, replace *CR*, Credit, and *NC*, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A*, Excellent; *B*, Good; *C*, Minimum Pass; *F*, Failure; *I*, Incomplete; *IPG*, In Progress; *CR*, Credit; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-*, Good; *C+, C, C-*, Passing; *D*, Minimum Pass; *F*, Failure; *CR*, Credit; *NC*, No Credit; *I*, Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP*, High Pass; *P*, Pass; *F*, Failure; *IP*, In Progress; *I*, Incomplete; *CN*, Conditional; *W*, Withdrawal; *X*, Exempt, *CN/P*, Conditional converted to Pass; *CN/F*, Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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Unofficial Transcript

Colorado State University Unofficial Transcript for Logan Douglas Stein (831960739)

Thursday, March 9, 2023 3:10:53 PM

Undergraduate

Overall Credit Hours Earned: 122.000
Colorado State University Credit Hours Earned: 60.000
Colorado State University GPA Credit Hours: 57.000
Colorado State University Grade Points: 226.668
Colorado State University Cumulative GPA: 3.976
Transfer Credit Hours Earned: 62.000

Degrees Awarded

Spring Semester 2020 - Bachelor of Arts

Conferred: 16-May-2020

- **MAJOR:** Sociology
  - **CONCENTRATION:** Criminology and Criminal Justice
- **MINOR:** Legal Studies Interdisciplinary Minor

Honors:

- Magna Cum Laude

Academic Term Summary

Term	Term Dates	Class	Major	Term GPA	Quality Points	GPA Hours	Hours Earned	End of Term Standing
Summer Session 2020	05/18/2020 - 08/07/2020	Senior	Sociology	0.000	0.000	0.000	0.000	

Spring Semester 2020	01/21/2020 - 05/15/2020	Senior	Sociology	4.000	48.000	12.000	12.000	Good Standing
Fall Semester 2019	08/26/2019 - 12/20/2019	Senior	Sociology	4.000	52.000	13.000	16.000	Good Standing
Summer Session 2019	05/20/2019 - 08/09/2019	Senior	Sociology	0.000	0.000	0.000	0.000	
Spring Semester 2019	01/22/2019 - 05/17/2019	Senior	Sociology	4.000	64.000	16.000	16.000	Good Standing
Fall Semester 2018	08/20/2018 - 12/14/2018	Junior	Psychology	3.916	62.668	16.000	16.000	Good Standing

Completed CSU Courses

Term	Course	Title	Credits	Grade	Level	Comments
Spring Semester 2020	ANTH-417-001	Indigenous Environmental Stewardship	3	A	Undergraduate	
Spring Semester 2020	JTC-316-001	Multiculturalism and the Media	3	A	Undergraduate	
Spring Semester 2020	LB-360-001	Mock Trial	3	A+	Undergraduate	
Spring Semester 2020	SOC-354-001	Law Enforcement and Society	3	A	Undergraduate	
Fall Semester 2019	ETST-365-001	Global Environmental Justice Movements	3	A	Undergraduate	
Fall Semester 2019	LB-487-001	Internship	3	S	Undergraduate	
Fall Semester 2019	MATH-101-L01	Math in the Social Sciences (GT-MA1) - Lab	0	NGC	Undergraduate	
Fall Semester 2019	MATH-101-001	Math in the Social Sciences (GT-MA1)	3	A+	Undergraduate	
Fall Semester 2019	PHIL-312-001	Philosophy of Law	3	A	Undergraduate	
Fall Semester 2019	SOC-487-001	Internship	3	A	Undergraduate	
Fall Semester 2019	SOC-492-001	Seminar	1	A	Undergraduate	
Spring Semester 2019	BUS-205-003	Legal and Ethical Issues in Business	3	A	Undergraduate	
Spring Semester 2019	LB-205-001	Contemporary Legal Studies	3	A+	Undergraduate	

Spring Semester 2019	NR-150-001	Oceanography (GT-SC2)	3	A+	Undergraduate	
Spring Semester 2019	SOC-301-001	Development of Sociological Thought	3	A+	Undergraduate	
Spring Semester 2019	SOC-311-002	Methods of Sociological Inquiry	3	A+	Undergraduate	
Spring Semester 2019	SOC-313-002	Computer Methods in Sociology	1	A	Undergraduate	
Fall Semester 2018	HIST-151-007	U.S. History Since 1876 (GT-HI1)	3	A	Undergraduate	
Fall Semester 2018	LIFE-102-005	Attributes of Living Systems (GT-SC1)	4	A-	Undergraduate	
Fall Semester 2018	LIFE-102-L02	Attributes of Living Systems (GT-SC1) -Lab	0	NGC	Undergraduate	
Fall Semester 2018	PSY-252-001	Mind, Brain, and Behavior	3	A	Undergraduate	
Fall Semester 2018	PSY-315-001	Social Psychology	3	A	Undergraduate	
Fall Semester 2018	SOC-455-001	Sociology of Law	3	A	Undergraduate	

Transfer Courses

Term	Institution	Course	Title	Credits	Grade
Spring Semester 2018	Univ of Colorado at Colo Spgs	BUS-150	*MS Office Apps & PC Bscs	3	TA
Spring Semester 2018	Univ of Colorado at Colo Spgs	PHIL-350	Politics & The Law	3	TA
Spring Semester 2018	Univ of Colorado at Colo Spgs	PSY-320	Abnormal Psychology	3	TA
Spring Semester 2018	Univ of Colorado at Colo Spgs	SOC-358	Corrections	3	TA
Spring Semester 2018	Univ of Colorado at Colo Spgs	SOC-372	Spec Topics in Soc	3	TA
Fall Semester 2017	Univ of Colorado at Colo Spgs	POLS-101	American Political System	3	TA-
Fall Semester 2017	Univ of Colorado at Colo Spgs	PSY-250	Psych Research + Measurement	4	TA
Fall Semester 2017	Univ of Colorado at Colo Spgs	SOC-1++	Introduction to Sociology	1	TA
Fall Semester 2017	Univ of Colorado at Colo Spgs	SOC-100	Introduction to Sociology	3	TA

Fall Semester 2017	Univ of Colorado at Colo Spgs	SOC-3++	Violence in Society	3	TA
Fall Semester 2017	Univ of Colorado at Colo Spgs	SPCM-200	Public Speaking	3	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	CO-130	Rhetoric & Writing I	3	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	CO-150	Rhetoric & Writing II	3	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	HES-2++	Yoga Theory & Practice	2	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	PHIL-205	Introduction to Ethics	3	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	SOC-352	Crime Theory & Causes	3	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	STAT-1++	Intro to Psychological Stats	1	TA
Spring Semester 2017	Univ of Colorado at Colo Spgs	STAT-201	Intro to Psychological Stats	3	TA
Fall Semester 2016	Univ of Colorado at Colo Spgs	PHIL-110	Critical Thinking	3	TA
Fall Semester 2016	Univ of Colorado at Colo Spgs	PSY-100	General Psychology	3	TA
Fall Semester 2016	Univ of Colorado at Colo Spgs	SOC-253	Intro to Criminal Justice	3	TA
Fall Semester 2016	Univ of Colorado at Colo Spgs	TLA-1++	Gateway Program Seminar	3	TA

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Logan Stein has applied to you for a clerkship, and I write to offer my enthusiastic support for his application. Logan has been a very fine student in two of my classes and provided me with excellent research assistance. He has all the character traits need to be an excellent law clerk. He is bright, diligent in his preparation and research, able to turn around projects on a very short timeline, and especially clear in oral and written presentation of his ideas and questions.

In my Spring 2022 Property Law course, Logan excelled in class discussion. He reads carefully and critically, demonstrating an ability to accurately explain the judge's reasoning in a case or the structure of a litigant's argument, and then to identify weaknesses or places of uncertainty in the opinion or argument. Logan also showed unusually good judgment in determining which of his questions were appropriate to ask during the class and which – typically because of their complexity or relevance for the focus of a class – were better asked during office hours. He earned a grade of A- in the course, with a score that placed him in the top quarter of the class.

Logan was also a student in my Spring 2023 course in Professional Responsibility and Ethics. Because of the size of the class, I do not encourage student questions during class – they participate by answering a series of multiple-choice questions embedded in my lectures. As in Property, my discussions with Logan outside of class were intellectually rich and enjoyable. His careful reading of the Model Rules and Restatement provisions (along with their comments) surfaced ambiguities that I had glossed over in class or failed to fully explain. Logan also posed challenging hypothetical questions that led me back to the governing law, and on several occasions to a survey of state bar committee opinions or secondary sources for guidance in responding to him. He also earned a grade of A- in that class. I do not raise students' grades for class participation (or in this context, the quality of engagement outside of class), but if I did Logan would have received an A in both courses.

Based on our conversations in Ethics, I asked Logan to do a research project on one of the questions he had asked me: How does the law handle contact between investigators or prosecutors and potential targets in criminal cases, especially when those potential targets are already represented by counsel? Within three weeks – during an especially busy time for him at the end of the semester – Logan produced an excellent memo based on his research into case law in criminal procedure and legal ethics, along with a good survey of legal commentary on the issues involved. Moreover, Logan created several multiple-choice questions on those issues; I will add one or two of the questions to my course next fall. His writing was clear and well-organized; the summary of authorities was concise and accurate, and the memo led me through the relevant distinctions needed for a solid understanding of this complex topic. I am grateful for his research and look forward to adding the topic to next year's classes.

I have students who receive better grades in my classes, but very few match the intellectual energy and hard work that Logan consistently shows. He would be an excellent and enjoyable addition to any chambers, and I am confident that he will be a superb law clerk and lawyer. Please let me know if you have additional questions. You can reach me by phone at (202)236-0518 or by email at rtuttle@law.gwu.edu.

Respectfully,

Robert W. Tuttle
Berz Research Professor of Law and Religion

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a great pleasure to recommend Logan Stein for a clerkship in your chambers. Logan has remarkable energy and vitality, as befits a former semi-pro hockey player. He has an intense interest in criminal law and procedure and aims to be an Assistant U.S. Attorney. He also has a deep commitment to community service.

In my Criminal Procedure class in fall 2022, Logan stood out for his thorough preparation and accurate answers to my questions. He also posed a number of interesting questions that deepened the understanding of the material for the entire class. I was always glad to see his hand raised, as I knew that I and the whole class would benefit.

Given his excellent class participation, I had high expectations for his exam. But he outdid them, earning a grade of A+. His answers to the multiple choice questions showed that he had mastered the doctrine. Logan showed that he grasped the deeper themes of the course and applied them perfectly to the essay question. He demonstrated not only writing talent, but also outstanding analytic ability.

Logan's favorite course in law school is Criminal Procedure. He has a longstanding interest in criminal justice issues; he majored in the sociology of criminal justice, and so far in law school has done three internships related to criminal law, working with a public defender's office in Colorado, the U.S. Attorney's Office in DC, and the Commonwealth Attorney's Office in Arlington, VA. He intends to be a trial litigator, and specifically a prosecutor. His goal is to be an Assistant U.S. Attorney within five years.

He is currently writing a note for the Federal Circuit Bar Journal on the Promise to Address Comprehensive Toxics (PACT) Act of 2022. The Act concerns veterans exposed to burn pits. He observes that the Act does not presumptively provide care to federal civilian employees or government contractors who are often exposed to toxins in the same way as veterans. He argues that the Federal Circuit's jurisdiction should be expanded to include claims for benefits by those persons to help ensure uniform treatment of claims by a court that can develop considerable competency in the area.

Logan is also planning to submit for publication a paper on the use of forced labor in apparel supply chains. He focuses particularly on violations of Uyghur human rights in China, and how products of forced labor are difficult to identify in apparel supply chains. He recommends implementing mechanisms that can identify the use of forced labor, including use of synthetic DNA and cotton isotope tracing.

Logan grew up in Colorado Springs in an intense hockey environment. He and his older brother threw themselves into the sport, and both played semi-pro hockey in Wisconsin. Logan keeps active, snowboarding, hiking, and learning new sports to play with friends. He is interested in craft cocktails and craft coffee; the former is a particular hobby (I can understand that, as it's one of mine too). He enjoys learning to make classic cocktails but also appreciates their history; he recently read Susan Cheever's Drinking in America: Our Secret History, which begins with the Mayflower, a retired wine transporting ship, and provides an unsentimental look at the role of alcohol in American political and social life. In Washington and in Colorado, he took on significant volunteer activities; he relishes community service. I always enjoy conversations with Logan. He would be a pleasure to work with and a great asset to your chambers.

Please do not hesitate to contact me if I may be of further assistance.

Very truly yours,

Renée Lettow Lerner
Donald Phillip Rothschild Research Professor of Law
George Washington University Law School
(202) 994-5776
rlerner@law.gwu.edu

Candice C. Wong
1441 Rhode Island Ave NW #401
Washington, DC 20005
candice.chiu@post.harvard.edu
857-205-2885

June 1, 2023

To Whom It May Concern,

I am pleased to recommend Logan Stein in support of his application for a clerkship in your Chambers.

Logan interned from June to August 2022 with the Violence Reduction and Trafficking Offenses Section of the U.S. Attorney's Office in the District of Columbia, where I serve as an Assistant United States Attorney and as the Chief of the Section.

I worked with Logan on a number of legal and investigative assignments during his internship. Logan consistently exhibited a proactive, self-starting attitude, showing himself to be eager to seek out assignments from attorneys. Whether it was research into an issue of law relating to the applicability of a particular sentencing enhancement, the initial drafting of a sentencing memorandum for a narcotics trafficking conspiracy defendant, or the review of voluminous digital evidence to excise key pieces of relevant evidence, Logan could be counted on to volunteer for assignments and be responsive and efficient in turning them around. He always showed an interest in expanding his skillset, and, remarkably, in actively soliciting feedback on his written product. He showed himself to be a hard worker, strong multi-tasker, and clear writer.

Logan is admirably committed to a career in public service and he exhibits a strong sense of his own areas of interest. It is telling that he took the initiative of signing on for another two months, from August to December 2022, of interning with the Fraud and Public Corruption and Civil Rights Section of our office, where by his own design he was able to gain exposure to different statutes and subject matters.

I am confident that Logan is ready to immerse himself in all the new legal issues, procedures, and opportunities that a clerkship presents. Please do not hesitate to reach out to me at 857-205-2885 with any further questions.

Sincerely,

Candice C. Wong

Logan Stein

1800 N Oak St. Apt. 1015, Arlington, Virginia | (719) 487-5500 • Lstein9@law.GWU.edu

The attached writing sample is a response motion that I drafted for an Assistant Commonwealth Attorney in Arlington, Virginia. The Defense had filed a motion to suppress the evidence the Officers discovered after searching the Defendant's car. They ambiguously argued numerous Fourth Amendment violations requiring suppression. In response, the Commonwealth argued that no Fourth Amendment violations occurred and all actions by the officers were justified. The Arlington Commonwealth's Attorney's Office has approved my use of this writing sample.

RESPONSE MEMORANDUM IN OPPOSITION TO MOTION TO SUPPRESS

The Commonwealth of Virginia, by and through its attorney, the Commonwealth's Attorney for Arlington County, respectfully submits this Response Memorandum, opposing the Defense's Motion to Suppress. The Court should deny the Motion to Suppress because the officers were reasonable and justified in all searches and seizures during their investigation.

INTRODUCTION

On June 22, 2022, at approximately 1900 hours, Officer Keating and Officer Bane were located at the Pentagon City Fashion Center Garage in full patrol uniform and a marked Arlington County Police Department cruiser. While the officers were parked on the P3 level of the garage, the officers heard tires screeching and an accelerating revving engine. The officers observed a white, newer model Jeep Grand Cherokee Trackhawk which was later determined to be driven by the Defendant, traveling at a high rate of speed down the ramp towards the lower levels. Officer Keating observed the Defendant snap his gaze to his left as he passed the officers and appeared to have an involuntary reaction of surprise to the presence of uniformed police officers. Defendant slammed on his brakes which illuminated the rear brake lights and caused the front-end suspension to drastically compress, the front end of the Trackhawk to nosedive, and the Defendant to lurch forward in his seat. At this time the officer found the Defendant's nervous reaction to the marked law enforcement officers to be suspicious and decided to investigate further.

Officer Bane observed the Trackhawk park nose in on P1 level in a parking space and the Defendant exit the vehicle to walk at a high rate of speed into the shopping center. Officer Keating observed that the Trackhawk had a single temporary rear license plate (Wisconsin dealer tag WH2068D) which returned to a "PMC Motorcar Inc" out of Arlington, Wisconsin. Officer

Keating observed the Trackhawk's vehicle identification number (VIN) displayed in the windshield (1C4RJFN98JC228391). Based on Officer Keating's training and experience, they noticed numerous suspicious indicators regarding the VIN. The color of the characters appeared to be off-color, the font did not match what is normally found, the text of the characters was much bolder than typical, and the lines appeared blurred on some edges. Moreover, Officer Keating was able to compare the VIN of the Trackhawk with another Jeep Grand Cherokee of a similar model year located within the garage to confirm the differences in VIN character and color. Based on these observations, Officer Keating believed the Trackhawk was a reVINed or cloned vehicle.

Furthermore, Officer Keating searched all 50 states NLETS for the Trackhawk's VIN. The search returned only a single return out of California for a 2018 Jeep with a suspended registration and a title mileage of 25,348mi. Officer Keating then referenced a law enforcement database for vehicles and found that the VIN was originally entered on May 31, 2021 in California again with the same mileage of 25,348mi. Officer Keating found this highly atypical and throughout their law enforcement experience had never seen a legitimate, newer model Fiat Chrysler Automobiles vehicle to have no record of existing for three years and then suddenly be registered with over 25,000mi. Additionally, based on Officer Keating's training and experience, they knew that Fiat Chrysler Automobiles, specifically those with the upgraded engine present in Trackhawks like the vehicle in question, are disproportionately targeted for auto theft and then subsequent reVINing.

At approximately 2015 hours, Officer Keating observed the same individual they previously observed driving the Trackhawk, the Defendant, exit the shopping center and walk into the garage. The Defendant began to walk in the direction of the Trackhawk and the officers.

Prior to reaching the location of the Trackhawk and the officers, the Defendant clearly observed both Officer Keating, Officer Bane, and their marked law enforcement cruiser. Officer Keating observed the Defendant freeze in his tracks upon noticing the officers. The Defendant retrieved his phone from his pocket and aimlessly took a few steps before making a call. The Defendant walked in a wide circle around where the Trackhawk and the officers were located while looking out of the corner of his eyes multiple times at the officers. Officer Bane confirmed that the individual was the same individual they observed exiting the vehicle and Officer Keating also confirmed they were the same individual they observed operating the vehicle earlier.
Officer Keating then contacted the Defendant, confirmed he was the driver and possessor of the Trackhawk, and informed him that he was being detained. Officers identified the Defendant based on his Maryland license. Officers informed the Defendant that they would be seizing the Trackhawk. During the encounter Officer Keating observed the Defendant transfer a red Jeep key fob from his front left pocket to his front right pocket and refused to provide the officers with the key fob.

Later, while officers were waiting for a tow truck, officers allowed the Defendant to sit in the front passenger seat of a female companion's vehicle (Ms. Tyesha Thompson). Officer Keating approached the Defendant and explained that the key fob for the Trackhawk needed to be seized as evidence. The Defendant refused to provide Officer Keating with the key fob. Officer Keating observed the red Jeep key fob in the door pocket of the passenger side door of Ms. Thompson's vehicle in plain view. Officer Keating grabbed the key fob attempting to seize it and the Defendant grabbed Officer Keatings wrist. The Defendant attempted to pry Officer Keating's fingers off of the key fob, but Officer Keating ultimately seized it. Ms. Thompson then drove the Defendant away from the scene.

Officer Keating waited for the tow truck and then inventoried the items in the vehicle. In the course of doing so, Officer Keating located what appeared to be a key fob readout sheet belonging to a different Jeep (VIN 1C4RJFN98JC3067561). In the glove box, Officer Keating located a VIN sticker bearing another different VIN which a subsequent search returned as a stolen white 2018 Jeep Trackhawk from Kunes Chrysler Dodge Jeep Ram in Belvidere, IL. Officer Keating also observed a kitchen blender box within a street slick tire. Inside the box were three large vacuum sealed bags filled with green leafy substance that was later determined to be 3.3lbs of marijuana. Additionally, there were approximately 150 commercially packaging bags commonly used for marijuana sale.

LEGAL ARGUMENT

Law enforcement officers acted reasonably and complied with the Fourth Amendment at all stages of their investigation. In Defense's Motion, they ambiguously raise four instances that they claim require further Fourth Amendment analysis. While the Defense fails to articulate what specifically they are claiming is a Fourth Amendment violation and what evidence they are seeking to be excluded, this analysis clearly illustrates that no Fourth Amendment violations occurred and all of the evidence collected on June 22, 2022, is admissible. The instances analyzed in this case are (I) the seizure of the Defendant when officers detained his person, (II) the seizure of the Trackhawk, (III) the seizure of the Trackhawk key fob, and (IV) the search of the Trackhawk. All these instances are justified on Fourth Amendment grounds and do not violate the Defendant's Fourth Amendment rights. Therefore, the Defense's Motion to Suppress must be denied.

I. The Seizure of the Defendant's person

Officers' seizure of the Defendant's person was reasonable and justified in accordance with the Fourth Amendment and *Terry v. Ohio*. In *Terry v. Ohio*, the Court held that law enforcement officers may temporarily detain a suspect when there is reasonable suspicion the individual has committed or is likely to commit a crime. The reasonable suspicion must be considered in the "totality of the circumstances" to determine whether "the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Moreover, an officer's experience, training, and expertise may allow them to identify or make inferences that would not raise suspicion for untrained individuals. *United States v. Cortez*, 449 U.S. 411 (1981).

In this case, as evidenced by Officer Keating's Field Case Report, they have articulated numerous particularized and objective facts that create reasonable suspicion which justifies a Terry stop. When officers first observed the Defendant, he reacted to their presence in a startled manner and involuntarily snapped his gaze in their direction. The Defendant then quickly stomped on the brakes of the Trackhawk in response to their presence. Later, when he exited the shopping center and once again observed the officers, the Defendant stopped in his tracks to walk awkwardly about followed by an attempt to observe the officers without drawing attention to himself. When he was informed that he was detained, he became increasingly noncompliant and even tried to walk away from the officers.

Furthermore, Officer Keating, utilizing his training and experience, observed multiple oddities with the VIN of the Trackhawk: The color of the characters appeared to be off-color as opposed to the normal clear white, the font did not match what is normally found on proper VIN plates of similar models, the text of the characters was much bolder than typical, and the lines

appeared blurred on some edges. These observations were corroborated when Officer Keating observed a similar Jeep Grand Cherokee of a similar model year located within the garage. Furthermore, upon searching the NLETS and law enforcement systems, Officer Keating discovered the Trackhawk had no record of existing for a period of about three years and then all of the sudden was titled with over 25,000mi. All of these facts, considered in the totality of the circumstances and with Officer Keatings experience in law enforcement, not only provide for reasonable suspicion but provide probable cause that the vehicle was stollen, reVINed, or cloned in violation of the law. Therefore, Officers had legal justification to detain the Defendant for purposes of investigating his involvement in these criminal offenses including the alleged charge of possession of a reVINed vehicle in violation of §46.2-1075 Code of Virginia (1950).

II. The Seizure of the Trackhawk

Officers' seizure of the Trackhawk was reasonable and justified under the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Court held that officers may seize and search an automobile if they have probable cause to believe it contains evidence of a criminal offense. *Id.* Additionally, police may search the automobile immediately upon finding probable cause, or they may impound the vehicle and search the vehicle later. *Chambers v. Maroney*, 399 U.S. 42 (1970). As previously discussed, all of the facts Officer Keating describes in detail in their Field Case Report rise to the level of probable cause. The Defendant's repeated irregular behavior in response to observing the officers, the observed irregularities with the VIN of the Trackhawk, and the search results of the VIN in law enforcement systems together create a significant probability that the Trackhawk contains evidence of criminal activity. Therefore, Officer Keating was justified in seizing the Trackhawk to later search for evidence of criminal activity.

III. The Seizure of the Trackhawk Key Fob

Officer Keating's seizure of the Trackhawk key fob was reasonable and justified under the Fourth Amendment because it was evidence of criminal activity regarding the vehicle. As previously established, officers had probable cause to seize the Trackhawk because of the articulated facts by Officer Keating. Therefore, officers have probable cause to seize evidence of the criminal activity regarding the Trackhawk. The key fob is evidence of this criminal activity and therefore it was reasonable and justified for officers to seize it in the course of their investigation.

Furthermore, the key fob was not in the possession of the Defendant at the time Officer Keating seized it, rather it was in the passenger compartment of Ms. Thompson's vehicle. Therefore, the Defendant lacks standing to claim that seizure of the key fob violated his Fourth Amendment rights because he does not have privacy interests in Ms. Thompson's vehicle. Fourth Amendment rights are personal rights, and the Defense fails to show that his personal rights were violated when Officer Keating seized the key fob from Ms. Thompson's vehicle. In *Rakas*, the Court held that individuals do not have privacy rights in a third party's vehicle and that any search and subsequent seizures from the third party's vehicle cannot have had their Fourth Amendment rights violated. *Rakas v. Illinois*, 439 U.S. 128 (1978). Moreover, this same principle was also held in *Rawlings* where the Court held that when officers searched and seized drugs from a third party's purse, the defendant did not have standing to assert privacy rights of a purse that was not theirs. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Here, the key fob was located in the passenger door compartment of Ms. Thompson's vehicle while in plain view. The key fob was not in the Defendant's possession at the time it was seized, but rather Ms. Thompson's.

Therefore, any challenge to seizure of the key fob from the Defendant must fail because his privacy rights are not implicated by Officer Keatings actions in seizing the key fob.

Alternatively, if the Court is inclined to find that the seizure of the Trackhawk key fob was a violation of the Defendant's Fourth Amendment rights, it should still deny the Motion to Suppress because discovery of the evidence in the Trackhawk was inevitable. In *Nix v. Williams*, the Court held that evidence that would otherwise be discovered through legitimate means can be admissible regardless of any Fourth Amendment violation. *Nix v. Williams*, 467 U.S. 431 (1984). Here, officers had probable cause from the above described facts to believe the Trackhawk contained evidence of criminal activity. The probable cause is independent of the seizure of the Trackhawk key fob. Put simply, even if the key fob was not seized by officers, they still were justified independently in searching the vehicle and would have discovered the evidence within. Therefore, even if the Court finds that Officer Keating violated the Defendant's rights when he seized the Trackhawk from Ms. Thompson's passenger door compartment, officers were justified in searching the Trackhawk and the discovery of the evidence inside the Trackhawk would have inevitably been discovered by law enforcement.

IV. The Search of the Trackhawk

Officers' search of the Trackhawk after seizing it was pursuant to probable cause and is reasonable and justified under the Fourth Amendment. As previously discussed, under *Carroll*, officers are justified in warrantlessly seizing and searching a vehicle when there is probable cause to believe it contains evidence of criminal activity. *Carroll,* 267 U.S. at 156. The Court reasoned this holding on the high possibility of destruction of evidence and the increased mobility of automobiles. *Id.* at 154. Also, under *Chambers* officers may search the vehicle at the time of establishing probable cause or they may wait to search it later upon impounding.

Chambers, 399 U.S. at 52. In this case, Officer Keating waited for the tow truck to arrive and then proceeded to conduct an inventory search of the contents of the vehicle. At this time, Officer Keating discovered further incriminating evidence inside the Trackhawk. The evidence included a key fob readout sheet belonging to a different vehicle, a VIN sticker with a different VIN that was later discovered to be for a stolen car from Illinois, approximately 3.3lbs of marijuana, and about 150 commercial packaging bags commonly used to package marijuana. Officer Keating acted reasonably and justifiably in searching the Trackhawk because he had probable cause to believe it contained evidence of criminal activity.

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully asks the Court to deny the Defense's motion to suppress the evidence lawfully obtained on June 22, 2022.

Applicant Details

First Name	**Kyle**
Last Name	**Steinberg**
Citizenship Status	**U. S. Citizen**
Email Address	**stei1228@umn.edu**
Address	**Address** Street **1009 18th Ave SE** City **Minneapolis** State/Territory **Minnesota** Zip **55414**
Contact Phone Number	**9526882131**

Applicant Education

BA/BS From	**University of Minnesota-Twin Cities**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Civil Rights and Civil Liberties ABA National Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Elrashidi, Halla
elra0004@umn.edu
Brenner, Victoria
VBrenner@taftlaw.com
6129778737
Norins, Clare
cnorins@uga.edu
(706) 542-1419

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kyle J. Steinberg

1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

June 13, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510
Dear Judge Walker,

I am a third-year student at the University of Minnesota Law School, and I am excited to be considered for a clerkship in your chambers for the 2024-25 term, following my graduation. I am a strong candidate for this position based on my excellent legal research and writing skills as demonstrated through my employment and moot court experiences, along with my passion for public interest work.

As a Twin Cities native, George Floyd's murder spurred a years-long span of learning and listening for me, and it's something that I hope never stops. I am committed to becoming a public interest attorney not because of personal trauma, but because I believe every person deserves to have the same "basic" privileges I enjoyed growing up—sports to keep me active, instruments to foster creativity, and no worry of where or when my next meal would be. I hope to learn from your experience as co-founder of the Committee on Race, Policing, and Prosecution at the United States Attorney's Office. Further, the opportunity to learn from attorneys arguing before the court is a valuable one—I view this clerkship as a duty not only to assist the court in administering justice, but also a learning experience to become a strong advocate for any future clients I may have.

While I certainly have much to learn from a clerkship in your chambers, I also have much to contribute. I have expanded upon a strong legal research and writing foundation established in my first year. After receiving an "Honors" grade in my first-year Legal Research and Writing course, I continued developing my legal writing skills through intensive brief-writing experiences in my second-year moot courts. During my Civil Rights and Civil Liberties in-house moot court, I argued for the plaintiffs/petitioners a violation of their First Amendment right to record police at a protest. My brief was nominated as the best in my section of the course. Additionally, I represented the University of Minnesota Law School in the ABA National Appellate Advocacy Competition this spring, arguing another First Amendment issue. I truly enjoy researching and writing about legal issues, and a clerkship in your chambers would allow me to exercise my writing skills across new areas of the law.

Further, my professional experiences have prepared me well to serve as your clerk. Last summer, I served as a Legal Intern with the First Amendment Clinic at the University of Georgia School of Law. I took on a significant workload and gained a great deal of litigation experience in just ten short weeks. I drafted answers to interrogatories, researched and drafted an opposition argument to a motion from opposing counsel, researched varying legal issues and presented my findings through internal memos, took part in deposition strategy meetings, and sat in on the depositions themselves. I continued my commitment to public interest work during the last academic year through a pro bono clerkship with a large law firm. I had broad exposure across a variety of matters that included intensive research as well as client-facing work and interviewing potential witnesses. I am building further upon my experiences this summer with the Federal Public Defender for the District of Kansas, where I have already experienced client intake, interacted with judges and prosecutors, and watched and contributed to a trial. Each of these experiences has allowed me to develop my legal writing and advocacy skills along with learning what the practice of law truly entails, while developing the maturity that is necessary to aid in legal proceedings as your clerk.

Enclosed you will find my resume, writing sample, transcripts, and letters of recommendation from Professor Clare Norins, Adjunct Professor Halla Elrashidi, and Victoria Brenner. Thank you for considering my application and I look forward to hearing from you soon.

Sincerely,

Kyle J. Steinberg

Kyle J. Steinberg

1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

EDUCATION

University of Minnesota Law School, Minneapolis, MN
J.D. Anticipated, May 2024
American Bar Association National Appellate Advocacy Moot Court Competition Team (2022-23)
GPA: 3.208/4.333
Awards: Legal Research and Writing Section C34 Best Oralist; Clary Cup oral argument semifinalist; Honors in Legal Research and Writing; Honors in Law in Practice; Best Brief nominee, Civil Rights and Civil Liberties Moot Court
Activities: Sports Law Association; Fighting Mondales Ice Hockey (Co-Captain)
Clinics: Criminal Defense Clinic (2022-23)

University of Minnesota - Curtis L. Carlson School of Management, Minneapolis, MN
Bachelor of Science in Business, Finance, 2020
GPA: 3.194/4.000
Honors: Securian Ethics Essay Competition scholarship winner
Activities: Undergraduate Ambassador; International Business Association; GLOBE
Study Abroad: Spring semester, Lyon, France, 2019

EXPERIENCE

Federal Public Defender, District of Kansas, Kansas City, KS
Third Chair Intern, May 2023 – July 2023

Taft Stettinius & Hollister LLP, Minneapolis, MN
Pro Bono Law Clerk, September 2022 – April 2023
Conducted legal research and ad-hoc projects on pro bono matters across all offices of the firm. Projects included unlawful search and seizure research, drafting documents and correspondence for a marriage dissolution, and docket research for prisoner abuse cases. Certified as a supervised student practitioner under Minnesota law.

University of Georgia School of Law, First Amendment Clinic, Athens, GA
Law Intern, May 2022 – July 2022
Supported clinic director and attorney fellow in Federal District Court civil rights litigation. Drafted answers to interrogatories. Conducted legal research; drafted memoranda to formulate legal direction of cases. Drafted oppositions to motions. Contributed to discussions on deposition strategy and attended depositions.

Tax Sheltered Compensation, Inc., Edina, MN
Retirement Plan Compliance Technician, June 2020 – June 2021
Ensured structure and documentation of retirement plan offerings of small and mid-size firms complied with relevant legislation and regulations. Participated in enrichment activities to deepen exposure to ERISA law.

TransPerfect Translations, Minneapolis, MN
Sales Intern, June 2019 – August 2019
Managed robust portfolio of over 70 clients to ensure translation needs were met. Engaged in frequent communication with both production teams and clients to determine most effective ways to meet business goals.

The Minnesota Daily, Minneapolis, MN
Sports Reporter, January 2017 – April 2017
Created weekly features for university's wrestling and softball teams. Experienced a fast-paced media environment.

ADDITIONAL

Interests: Watching and playing most sports, collecting vinyl records and attending concerts, hiking, fishing

UNIVERSITY OF MINNESOTA
OFFICE OF THE REGISTRAR

TRANSCRIPT RECORD

Law School Official

Name : Steinberg,Kyle J
Student ID : 5259580
Birthdate : 12 - 20

Print Date: 06/11/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

Student also has transcripts from the University of Minnesota at level(s):
Undergraduate

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	B+	13.332
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6005	Torts	4.00	4.00	B	12.000
LAW	6006	Civil Procedure	4.00	4.00	B	12.000
LAW	6007	Constitutional Law	3.00	3.00	B	9.000
TERM GPA :	3.089	TERM TOTALS :	17.00	17.00	15.00	46.332

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6004	Property	4.00	4.00	B-	10.668
LAW	6009	Criminal Law	3.00	3.00	B-	8.001
LAW	6013	Law in Practice: 1L	3.00	3.00	H	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	B	9.000
TERM GPA :	2.767	TERM TOTALS :	15.00	15.00	10.00	27.669

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6085	Criminal Procedure: Investigtn	3.00	3.00	B+	9.999
LAW	6219	Evidence	3.00	3.00	C+	6.999
LAW	6632	Employment Law	3.00	3.00	B	9.000
LAW	7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:		ABA Moot Court				
LAW	7055	Civil Rights/Liberties Moot Ct	1.00	1.00	A	4.000
LAW	7500	CL: Criminal Defense	2.00	2.00	A	8.000
TERM GPA :	3.231	TERM TOTALS :	13.00	13.00	13.00	41.998

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6084	Equal Protection	3.00	3.00	A-	11.001
LAW	6631	Employment Discrimination	3.00	3.00	B	9.000
LAW	6650	Advanced Administrative Law	3.00	3.00	B+	9.999
LAW	6915	Race and the Law	2.00	2.00	A	8.000
LAW	7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:		ABA Moot Court				
LAW	7055	Civil Rights/Liberties Moot Ct	1.00	1.00	A	4.000
LAW	7500	CL: Criminal Defense	2.00	2.00	A	8.000
TERM GPA :	3.600	TERM TOTALS :	15.00	15.00	15.00	54.000

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6051	Business Associations/Corps	4.00	0.00		0.000
LAW	6100	Basic Federal Income Tax	3.00	0.00		0.000
LAW	6618	Trial Practice	3.00	0.00		0.000
LAW	6665	PR - Government	3.00	0.00		0.000
LAW	7056	Civil Rights Moot Court Dir.	1.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	14.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	3.208	UM TOTALS:	74.00	60.00	53.00	169.999
		UM + TRANSFER TOTALS:		60.00		

***** End of Transcript *****

Kyle Steinberg
208 Geneva Boulevard
Burnsville MN 55306

In accordance with the Family Educational Rights and Privacy Act of 1974, non-public information about a student will not be released to a third party without written consent of the student.

Stacey Tidball
Associate Vice Provost & University Registrar
University of Minnesota, Twin Cities

Transcript Key

Academic calendar

The semester system started Fall 1999 for all University of Minnesota campuses. Prior to Fall 1999 the University used a quarter system with these exceptions: Law school started on semesters Fall 1981, and some College of Continuing Education courses were taught on a semester calendar but the credits reported as quarter credits.

Accreditation

The University of Minnesota is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools.

Course (class) numbering system (from Fall 1999)

0000 to 0999 remedial courses
1000 to 1999 primarily for undergraduates in first year
2000 to 2999 primarily for undergraduates in second year
3000 to 3999 primarily for undergraduates in third year
4000 to 4999 primarily for undergraduates in fourth year, may be applied to a Graduate School degree with approval by the student's major field and if taught by a member of the graduate faculty or an individual authorized by the program to teach at the graduate level
5000 to 5999 primarily for graduate students but third and fourth year undergraduates may enroll
6000 to 7999 for post-baccalaureate professional degree students
8000 to 9999 for graduate students

Prior course numbering systems

For Fall 1970 through Summer 1999 (course numbering prior to 1970 is noted in parentheses):
0000 to 0999 noncredit courses
1000 to 1999 (01 - 49) introductory courses primarily for freshmen and sophomores
3000 to 3999 (50 - 99) intermediate courses primarily for juniors and seniors
5000 to 5999 (100 - 199) advanced courses for juniors, seniors, and graduate students
8000 to 8999 (200 and higher) for graduate and professional school students

Credit

Starting Fall 1999 – units are semester credit
Prior to Fall 1999 – units generally are quarter credit (see calendar for exceptions)
Thesis credit – an asterisk (*) will appear following the course title of courses numbered 8777, 8888, or 8999 if the degree award is shown
An asterisk (*) indicates graduate credit taken though College of Continuing Education (Continuing Education and Extension prior to Fall 1999)

Grading policy (complete)

Available online at policy.umn.edu/Policies/Education/Education/GRADING TRANSCRIPTS.html

Grading definitions

A – achievement that is outstanding relative to the level necessary to meet course requirements
B – achievement that is significantly above the level necessary to meet course requirements
C – achievement that meets the course requirements in every respect
D – achievement that is worthy of credit even though it fails to meet fully the course requirements
E – achievement that is significantly greater than the level required to meet the basic course requirements but not judged to be outstanding
F (or N) – represents failure (or no credit) and signifies that the work was either (1) completed but at a level of achievement that is not worthy of credit or (2) was not completed and there was no agreement between the instructor and the student that the student would be awarded an I (see also I)
H – Honors (used by Law School and Medical School only)
I – (Incomplete) assigned at the discretion of the instructor when, due to extraordinary circumstances, e.g., hospitalization, a student is prevented from completing the work of the course on time. Requires a written agreement between instructor and student
K – assigned by an instructor to indicate the course is still in progress and that a grade cannot be assigned at the present time
LP - low pass (used by Law School only)
NG – no grade required
NR - grade not reported
O – represents outstanding achievement for Doctor of Medicine and Doctor of Veterinary Medicine programs
P – achievement designating passing work
Q – achievement designating passing work
R – a course related registration symbol
S – achievement that is satisfactory, which is equivalent to a C- or better for undergraduate students (C or better on the Duluth campus). Graduate and professional programs may establish higher standards for earning a grade of S.
T – test credit
V – registration as an auditor or visitor (a non-grade non-credit registration)
W – entered by the registrar's office when the student officially withdraws from a course after the second week
X – reported by the instructor for a student in a sequence course where the grade cannot be determined until the sequence is complete – the instructor is to submit a grade for each X when the sequence is complete
Y – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing passing work
Z – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing failing work

On the Twin Cities campus from Fall 1972 through Summer 1977 and on the Morris campus from Fall 1972 through Summer 1985, the official University transcript included only positive academic achievements. Courses in which the student received a grade of N or a registration symbol of I or W did not appear on the transcript.

Grade/Numeric Point Average formula

Effective Fall 1997, grade point values were standardized for the University. All units except Law use: A = 4.000, A- = 3.667,B+ = 3.333, B = 3.000, B- = 2.667, C+ = 2.333, C = 2.000, C- = 1.667, D+ = 1.333, D = 1.000, F = 0.000, I = 0.000, K = 0.000, X = 0.000. Effective Fall 2004, the Twin Cities campus Law School uses University standard grading, with the addition of A+ = 4.333 and excluding D+.
Before 1997, most units did not use +/-. But the Duluth campus and the School of Management used: A = 4.0, A- = 3.6, B+ = 3.3,
B = 3.0, B- = 2.6, C+ = 2.3, C = 2.0, C- = 1.6, D+ = 1.3, D = 1.0,
F = 0.0 and the Twin Cities General College used A = 4.0,
A- = 3.6, B = 3.2, B- = 2.8, C+ = 2.4, C = 2.0, C- = 1.6, D = 1.2, D- = 0.8, F = 0.0
Prior to Fall 2004, the Twin Cities campus Law School used a numeric rather than a grade point average for the *juris doctor (J.D.)* degree program. Grades ranged from 4-16 points based on the following: 14-16: Excellent/Outstanding; 11-13: Substantially better than average; 8-10: Minimally acceptable; 5-7: Inadequate (credits count towards degree completion, and NPA); 4: Failing; 0: Non-performance. Classes for which a 0 grade was earned are not included in NPA calculation. Grades earned in the *LL.M.* (Master of Laws) program were: A=4.00, B=3.00, C=2.00, D=1.00, F=0.00. No +/- distinctions are given.

Symbols following course numbers

C – certificate credit
E – on Duluth campus, registration in Continuing Education, or on Twin Cities campus, an MBA course
G – honors course for extra credit
H – honors course
J – evening MBA course for extra credit
K – evening MBA course by independent study
L – honors course by independent study
M – extra credit by independent study
Q – evening MBA extra credit by independent study
R – honors extra credit by independent study
S – semester registration (pre-1999)
T – semester honors course (pre-1999)
U – special term course taken for extra credit
V – honors and writing intensive
W – writing intensive
X – extra credit
Y – independent study
Z – special term registration

Additional notations

Canceled means that all course registration was canceled (i.e., dropped) before the end of the second week of the term.

Degree with distinction indicates graduation with high GPA; **degree with honors** (laude) indicates completion of honors program.

Second Language Proficiency means demonstrated intermediate proficiency in reading, writing, listening, and speaking.

For more information, visit www.umn.edu

Campus Records office locations:

University of Minnesota, Crookston
9 Hill Hall
Crookston, MN 56716-5001
218-281-8548
Dept of Educ Inst cd: 004069

University of Minnesota, Duluth
184 Darland Administration Building
Duluth, MN 55812-3011
218-726-8000
Dept of Educ Inst cd: 002388

University of Minnesota, Morris
212 Behmler Hall
Morris, MN 56267-2132
320-589-6030
Dept of Educ Inst cd: 002389

University of Minnesota, Twin Cities
333 Bruininks Hall or 130 Coffey Hall or 130 West Bank Skyway
Minneapolis, MN 55455 / St. Paul, MN 55108 / Minneapolis, MN 55455
612-624-1111 / 612-624-1111 / 612-624-1111
Dept of Educ Inst cd: 003969

University of Minnesota, Rochester
111 South Broadway
Rochester, MN 55904
507-258-8457
Dept of Educ Inst cd: 003969

The University of Minnesota, Waseca campus closed in 1992. For information on Waseca student transcripts, contact a Twin Cities office.

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great pleasure I recommend Kyle Steinberg for a judicial clerkship. I was fortunate to have Kyle in my 2022-2023 Civil Rights and Civil Liberties Moot Court section at the University of Minnesota Law School. Kyle is a skillful writer and will make an exceptional law clerk.

Kyle's written work for the course included an appellate brief, which I awarded as the Best Appellate Brief from my section. His brief was well-researched and well-organized, and exhibited his aptitude for legal writing, research, and analysis. He has an excellent ability to synthesize case law and clearly explain complex legal concepts in a simplified, effective, and concise manner.

Throughout the course, Kyle demonstrated his commitment to academic excellence through thoughtful and articulate contributions to class discussions. He demonstrated a keen interest in learning and dedication to advocacy. The course focused on issues related to civil rights and civil liberties and Kyle's tenacity to understand the many facets of the law was remarkable. He quickly identified relevant law and facts, which helped other students formulate arguments or better understand counterpoints.

I genuinely enjoyed working with Kyle and was consistently impressed with his work. He is personable, diligent, and reliable. I am confident he will be an exceptional law clerk.

Please do not hesitate to contact me with any questions.

Sincerely,

Halla Elrashidi (She/Her)
Adjunct Professor
Civil Rights Civil Liberties Moot Court

Taft/

2200 IDS Center, 80 South 8th Street
Minneapolis, MN 55402-2210
Tel: 612.977.8400 | Fax: 612.977.8650
taftlaw.com

Affirmative Action, Equal Opportunity Employer

Victoria J. Brenner
612.977.8737
VBrenner@taftlaw.com

April 27, 2023

VIA E-MAIL

To Whom It May Concern:

Re: Kyle Steinberg

Dear Sir or Madam:

It is with great pleasure that I recommend Kyle Steinberg as a law clerk or associate attorney. I had the fortune of working with Kyle on a difficult pro bono marital dissolution case at Taft and was consistently impressed with his sharp legal instincts. These instincts appeared in his superb drafting skills, where he decided what was relevant and what was not in presenting to me, and the mediator, the relevant facts and context of the case.

Kyle did an excellent job issue-spotting and asking relevant questions regarding the client and his case. He also paid a great deal of attention to the details presented in the case and drafted a proposed property settlement. Kyle and I had a great deal of back-and forth as we prepared for trial on the case.

Kyle works well independently and asks the right questions in an organized manner. He also uses good judgment with client matters. Kyle's interactions and client handling was always thoughtful and appropriate. After observing this about him, I asked him to call a potential witness in our case to vet a legal theory that the witness might have been useful in proving. He provided me with an excellent written report including his opinion about the efficacy of my proposed legal theory with this witness' information. Again, his instincts were solid regarding the questions asked in that interview and also in how he shared the information with me.

Since Kyle was not in our office every day of the week, he was conscientious about informing me about his schedule and was proactive in communicating with me about the status of his case projects.

In addition to being intelligent and organized, Kyle has also demonstrated superb people skills, both with me, my staff and my client. I have been impressed with Kyle throughout the entirety of the case and know that he will be highly valued by those fortunate to work with him.

Sincerely,

TAFT STETTINIUS & HOLLISTER LLP

/s/ Victoria J. Brenner

Victoria J. Brenner

VJB:egs

77027165v4

UNIVERSITY OF GEORGIA
School of Law
First Amendment Clinic

P.O. Box 388
Athens, Georgia 30603
TEL: 706.227.5421
FAX: 706.227-5440

April 5, 2023

Dear Judge:

I write with pleasure to recommend Kyle Steinberg for a clerkship in your chambers. I had the opportunity to work with and supervise Kyle as a full-time summer legal intern in the University of Georgia School of Law's First Amendment Clinic. I found his work to be exceptional, and he, as a person, is a delight

Over the course of the summer Kyle focused on conducting discovery and related motion practice in a § 1983 retaliatory prosecution case. He also handled multiple intakes with prospective clients, providing them with legal research and consultation on their presented issues.

Most importantly for a clerkship, Kyle is a highly effective legal researcher and writer. He is able to quickly orient himself to unfamiliar areas of the law, and then correctly apply that law to the facts of a case – doing so in a clear and succinct manner. Kyle works very independently, requiring minimal oversight, but is not afraid to seek guidance or ask for clarification when needed. He also readily absorbs and implements verbal and written feedback, making for easy communication and supervision.

Kyle is professional, personable, and focused. He got along well with both very strong, and more reserved, personalities who he encountered among the people in the clinic and our clients. Kyle is also quietly adventurous. During his summer in Georgia, he was always highly productive at work but, on weekends, took multiple solo trips to explore the southeast, demonstrating his desire to fully experience and take advantage of any given opportunity. Transferring those qualities to a clerkship setting, he will be eager to work on as many cases, and observe and assist with as many court proceedings, as possible.

And while he is a hard-worker, as noted, Kyle maintains a healthy balance of recreational interests and pursuits (for instance, he was also training for a marathon during his internship and exploring the local music scene), which makes him a well-rounded and engaging person with whom to work.

Given Kyle's combination of astute legal skills, strong work ethic, and ability to relate well with others, I have no doubt that he would make an immensely valuable contribution to the work of your chambers.

Sincerely,

Clare R. Norins

Clare R. Norins
Assistant Clinical Professor
First Amendment Clinic Director

Kyle J. Steinberg
1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

Writing Sample

This writing sample is a persuasive brief from my second-year Civil Rights and Civil Liberties moot court course. This brief is my own work, with light edits made by only myself after receiving feedback from my instructors. My writing is based on a purely hypothetical fact pattern; any names, places, or courts referenced are not representative of real people or entities.

In this brief, I represented a group of appellants who filed an appeal to reverse the judgment of the district court below, which granted summary judgment to the appellees here. I argue that the record indicates sufficient evidence for trial on both of appellants' claims—a violation of their right to record the police, and a retaliatory arrest effected by the police against appellants' First Amendment rights.

I researched and analyzed the record, the First Amendment to the United States Constitution, and extensive case law to develop my argument. This writing sample represents my best work. All fonts and formatting are in accordance with the local rules specified in the assignment.

File No. 123456

IN THE UNITED STATE COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

.

JESSICA BONT, BRADLEY CLARK, MARIA McDANIEL, LOCKE RIDER, R.M. RIDER, AND CHRIS SOPHAN, ON BEHALF OF PLAINTIFF

Plaintiffs-Appellants,

V.

OFFICER MIA JOHNSON, AND CITY OF LIBERTYVILLE, ON BEHALF OF DEFENDANT

Defendants-Appellees,

.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MOOT

.

PLAINTIFF-APPELLANT'S BRIEF

.

U.S. Attorney's Office for the District of Moot
Kyle Steinberg, Moot #292929
440 19th Avenue South
Metropolis, Moot 55414
Attorney for Plaintiff-Appellant

Table of Contents

Table of Authorities

Cases

Statement of the Issues

I. Clearly Established Right to Record

Police officers are afforded qualified immunity against claims of a violation of Constitutional rights unless such a right was clearly established law so that a reasonable officer under the circumstances would have known of its existence. The government may place reasonable time, place, and manner restrictions on the exercise of free speech. The right to record has been held to be established law by every circuit court which has considered the issue. Restrictions on protestor speech are not reasonable under the circumstances at hand. Therefore, Officer Johnson should be denied qualified immunity.

Apposite Authority:

Robbins v. City of Des Moines, 984 F.3d 673, 678 (8th Cir. 2021)

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)

Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011)

Irizarry v. Yehia, 38 F.4th 1282, 1288 (10th Cir. 2022)

Statement of the Issues

I. First Amendment Retaliatory Arrest

To establish a retaliatory arrest claim under the First Amendment, plaintiffs must show 1) a retaliatory animus exhibited by the defendant towards the plaintiff's speech and 2) that such animus was the direct cause of the arrest. Plaintiffs must also show either a lack of probable cause for the arrest or objective evidence that such an arrest is not usually enforced under similar circumstances absent the exercise of speech. Officer Johnson's view of the Appellants as "troublemakers" coupled with her comments to Appellants after their arrest establishes her retaliatory animus as the causal link for the arrests. Further, Appellants provide objective evidence that arrests for misdemeanor criminal trespass at protests are not typically enforced by Libertyville police officers. Therefore, the District Court's grant of summary judgment on this claim should be reversed.

Apposite Authority:

Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019)

Ballentine v. Tucker, 28 F.4th 54, 59 (9th Cir. 2022)

Statement of the Case

The City of Libertyville Proposed a Tax Levy That Generated Passionate Debate Among its Citizens.

In 2021, the City of Libertyville was considering imposing a sizeable tax levy on its citizens as a means of paying for technology improvements. (R. at 4; Compl. ¶8). This proposal evoked substantial reaction from the citizens of Libertyville—people on both sides of the issue spoke in support or disfavor of the levy. (R. at 5; Compl. ¶9).

Appellants are members of a group who protested the passage of the levy. (R. at 7; Compl. ¶16). They made their voices heard through online postings—videos and text—as well as an in-person protest at City Hall on August 22, 2021, the day that the school board voted on the levy. *Id.*

To accommodate all views on the levy, city officials and the Libertyville police arranged a protest location outside of City Hall on the day of the vote. (R. at 10; Compl. ¶28). The arrangement included a walkway into city hall surrounded by barricades on either side—one side was designated for proponents of the levy, while the other was reserved for protestors against the levy. (R. at 10; Compl. ¶29). The goal of this design was to protect the safety of the school board members as they entered and exited city hall while providing citizens space to exercise their views on the levy. *Id.*

In preparation for the protest, the Libertyville Police Department held a planning meeting to discuss strategies to contain the crowd. (R. at 8; Compl.

¶21). During the meeting, officers were explicitly instructed to respect the First Amendment rights of the protestors, including their right to record. *Id.* The officers were also shown videos of select protestors who were identified as potential "troublemakers" and told to keep an eye out for those individuals in the interest of maintaining a safe protest. (R. at 9; Compl. ¶25). Appellee, Officer Mia Johnson, is a police officer with the City of Libertyville and was present at this planning meeting. (R. at 8; Compl. ¶23).

Appellants Were Arrested for Recording the Actions of the Police at the Protest

On the evening of the school board meeting, there were many protestors on each side of the crowd. (R. at 10; Compl. ¶32). Officer Johnson was assigned to the Appellants' side of the protest. (R. at 11; Compl. ¶36). As the meeting progressed, the crowd grew louder as the protestors made their views clear to the other side. (R. at 11; Compl. ¶34). After the school board denied the levy, Appellants celebrated the outcome and became more vocal towards the other group of protestors. (R. at 11; Compl. ¶35). During this wave of emotion, Appellants' group of protestors moved forward, crossing the barricade into the walkway area. *Id.* Appellee aggressively ordered Appellants to return to their assigned place behind the barricade, and Appellants did so without issue. (R. at 12; Compl. ¶¶38-39). No arrests were made at that time. (R. at 12; Compl. ¶42).

Pro-levy protestors on the other side of the walkway became agitated and started to taunt and verbally harass Appellants and their fellow anti-levy protestors. (R. at 12; Compl. ¶40). Several pro-levy protestors breached their barricade. (R. at 12; Compl. ¶43). The police officers on that side of the protest calmly ushered the pro-levy group back behind their barricade without making physical contact. (R. at 13; Compl. ¶43).

To document the more favorable treatment the pro-levy group received from police, Appellants pulled out their phones and began to record the events. (R. at 13; Compl. ¶45). In an effort to establish a better recording angle, Appellants inadvertently knocked over their barricade and temporarily advanced past their boundaries. (R. at 13; Compl. ¶47). Officer Johnson once again aggressively ordered Appellants back behind their barricade, and Appellants once again immediately complied. (R. at 14; Compl. ¶¶50-51). Officer Johnson and the other officers on scene were aware that Appellants were recording them. (R. at 14; Compl. ¶49).

After the Appellants had retreated behind their barricade and while they continued to record the police, Officer Johnson then decided to arrest them. (R. at 15; Compl. ¶¶54-55). During the arrest, at least one appellant heard Officer Johnson say something to the effect of "maybe you'll stop making videos now." (R. at 15; Compl. ¶56). Officer Johnson indicated that the arrests were for criminal misdemeanor trespass under Moot State Statute § 78.25.

Police made nine arrests during the protest—six of which were Appellants. (R. at 16; Compl. ¶63). The other three arrests were pro-levy protestors from the other side of the protest. (R. at 17; Compl. ¶69). Only one pro-levy protestor had been branded as a "troublemaker" prior to the protest. Predictably, Officer Johnson hold pro-levy views, which had been made public on social media prior to the protest. (R. at 18; Compl. ¶74).

Procedural History

The city attorney dismissed all criminal charges against Appellants. (R. at 18; Compl. ¶76). Following this, Appellants filed suit in United States District Court for the District of Moot, alleging violation of and retaliation in accordance with Appellants' First Amendment rights. The District Court granted Appellees' motion for summary judgment, granting Officer Johnson and the City of Libertyville a complete defense of qualified immunity on both claims. (R. at 75). Appellants file this timely appeal.

Summary of the Argument

George Orwell once said, "If liberty means anything at all, it means the right to tell people what they do not want to hear." It was very clear what Officer Mia Johnson did not want to hear--on August 22, 2021, Officer Johnson abused her authority as a police officer by taking the extreme step to arrest Appellants for exercising their First Amendment rights at a protest—a fundamental pillar of the Constitution.

The right to speak and the right to record are core values under the First Amendment. Courts across the country have recognized those rights as enforceable by law. *Irizarry v. Yehia*, 38 F.4th 1282, 1290 (10th Cir. 2022). While time, place, and manner restrictions may be reasonably imposed on these rights by the government, no such justification was present here. A clearly established right was violated by Officer Johnson, and this Court should adhere to the decisions of the seven other circuits to decide the issue in denying Appellees a defense of qualified immunity.

The authority of these other circuits persuasively indicates that Appellants here had a clearly established right to record at Libertyville City Hall. The First Circuit in *Glik* held that the First Amendment protects recording a public official in a public place. *Glik v.* Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). The Third Circuit in *Fields* held that qualified immunity attaches to police officers unless the violated right was one which every reasonable official would have known. *Fields v. City of Phila.*, 862 F.3d 353, 356 (3d Cir. 2017).

Here, Officer Johnson was explicitly informed of Appellants' right to record at the protest. Simply put, any time, place, or manner restrictions advocated by Appellees are inappropriate for this case.

Not only did Officer Johnson's conduct violate a clearly established constitutional right, it did so in a retaliatory fashion. While probable cause can create a bar for retaliatory arrest allegations, Appellee's actions were so incompatible with Libertyville police department norms that such an issue becomes irrelevant. The Ninth Circuit in *Ballentine* lays out the model for objective evidence showing arrests like the ones at hand are not usually affected under similar circumstances. *Ballentine v. Tucker*, 28 F.4th 54, 59 (9th Cir. 2022). Officer Johnson's outwardly held opinions on the tax levy issue being protested and her comments to Appellants following their arrest establish a retaliatory animus and more than enough objective evidence to deny summary judgment and allow Appellants to present their case to a jury.

Standard of Review

Federal courts of appeals review *de novo* a federal district court's grant of a motion for summary judgment under Fed. R. Civ. P. 56(a). *Evans v. Skolnik*, 997 F.3d 1060, 1064 (9th Cir. 2021). As such, the court of appeals views the facts in the light most favorable to the nonmovant and decides whether there exists any genuine dispute of material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Under the *de novo* standard of review, the court of appeals shall give no deference to the findings of the district court. *Id.*

Argument

I. Plaintiffs' Actions Fall Within a Clearly Established First Amendment Right to Record the Police at a Protest.

First Amendment rights are subject to "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Eighth Circuit has stated "Government officials are entitled to qualified immunity unless their conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *Robbins v. City of Des Moines*, 984 F.3d 673, 678 (8th Cir. 2021)(citing *Gilmore v. City of Minneapolis*, 837 F.3d 827, 832 (8th Cir. 2016)). At issue here is whether the Plaintiffs' actions in recording the officers and protestors falls within a clearly established right to record under the First Amendment.

The plethora of persuasive authority among the other circuits provides a roadmap for this Court to follow in determining a First Amendment right to record police at a protest to be clearly established law in the Fifteenth Circuit.

A. The Right to Record Has Been Clearly Established by The Circuit Courts.

To establish a clear right under the Constitution absent controlling authority, there must exist a robust consensus of cases of persuasive authority. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)(citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Merriam-Webster's Dictionary defines "consensus" as "general agreement; unanimity." *Consensus*, *Merriam-Webster* (2022). First Amendment protections extend to citizens who record government officials conducting their duties. *Irizarry v. Yehia*, 38 F.4th 1282, 1288 (10th Cir. 2022). Each circuit court which has reviewed a right to record case has held that such a right is established under the First Amendment. *Id.* at 1290.

The First Circuit in *Glik* held that there exists a "clearly established right to film government officials, including law enforcement officers, in the discharge of their duties in a public space." *Glik v.* Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011).

In *Fields*, the Third Circuit established that the First Amendment right to access information allows the public to record, via photograph, film, or audio, police officers conducting police business in public areas. *Fields v. City of Phila.*, 862 F.3d 353, 355-56 (3d Cir. 2017). The specific facts of this case

resulted in a grant of qualified immunity because despite the Philadelphia police department adopting a recording policy, "not every reasonable police officer" knew of its existence. *Id.* At 361. Yet, the court nevertheless held that because the First Amendment protects actual photos, videos, and audio recordings, it must necessarily protect the act of creating the material. *Id.* at 358.

The Fifth Circuit addressed the matter in *Turner*, where the plaintiff was recording a police station when he was approached and questioned by officers who were concerned about who was recording their station. *Turner v. Driver*, 848 F.3d 678, 683 (5th Cir. 2017). While the court held that such a right had not been established at the time of the events in question, it established a First Amendment right to record the police for all future cases—noting "the circuits are not split" on the matter. *Id.* at 687—88.

In *Alvarez*, the Seventh Circuit granted injunctive relief against an Illinois eavesdropping statute, holding that audio recording of the police in public places is permitted. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

Similarly, in *Askins*, the Ninth Circuit held that First Amendment protections extend to photographing and recording matters of public interest, including "the right to record law enforcement officers engaged in the exercise of their duties in public places." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018).

Most recently, the Tenth Circuit in *Irizarry* held that an officer who had prevented a citizen from recording a roadside arrest violated a First Amendment right to record. *Irizarry v. Yehia*, 38 F.4th 1282, 1286 (10th Cir. 2022). The court here emphasized the persuasiveness of the cases above in coming to its decision. *Id.* at 1294. Importantly, this case was decided in 2022, reflecting a continuing sentiment that the right to record exists.

When considering the definition of "consensus" above—general agreement or unanimity—the national jurisprudence regarding the right to record provides a strong example. The consensus among the circuits is evident—the right to record is clear, it is established, and it is fundamental to the information-gathering rights long held to exist under the Constitution. The idea that simply because this court has not heard the issue is evidence of a split in the circuits is flawed. Courts may only decide on cases when they are ripe. While this is a case of first impression, the persuasive authority previously published by seven circuit courts is sufficient to establish the right to record in this circuit.

B. Plaintiffs Are Entitled to Record the Police in a Public Space.

"A citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Glik, 655 F.3d at 85. In *Glik*, the plaintiff was walking on the Boston Common when he observed three police officers arresting a man. *Id.* at 79. Hearing another bystander exclaim they thought the officers were hurting the man, the plaintiff grew

concerned that excessive force was being employed. *Id.* He then stopped approximately ten feet from the officers and began to record the arrest with his cell phone. *Id.* Upon handcuffing the detainee and noticing the plaintiff's recording, an officer approached him and asked whether the phone was capturing audio in addition to video. *Id.* at 80. When the plaintiff replied that it was, the officer placed him under arrest. *Id.*

The First Circuit reinforced its holding in Glik with its subsequent decision in Gericke. Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014). In Gericke, the court held First Amendment principles apply to recording a police officer during a traffic stop under the same "public space" principle. *Id.*

Here, Plaintiffs recorded Officer Johnson and the other officers working the protest exclusively in a public space—Libertyville's City Hall. (R. at 10). The exterior of the City Hall organization was designated specifically for protestors. While there were some limitations placed on who could stand in certain locations, this does not remove the designation of a public space. *Id.*

The "public space" principle allows citizens to hold public officials accountable when visible to their constituents. The Libertyville police set up a structure outside City Hall to ensure protestors didn't get out of hand. To prevent recording in such a public space would be to stifle the expression of the citizens.

C. Plaintiffs Are Entitled to Record The Police at a Protest

"Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Fields v. City of Phila.*, 862 F.3d 353, 356 (3d Cir. 2017). In *Fields*, the plaintiffs documented Philadelphia police officers carrying out their duties in two different instances—one was recording the arrest of a protestor during a protest, and the other was photographing the arrest of a citizen during the dispersal of a house party. *Id.* Officers in each case took steps to prevent the documentation of the arrests by the plaintiffs. *Id.* The Third Circuit held that recordings of public officials remove subjective intent and are a critical part of the public's right to information about their officials. *Id.* at 359.

"Government officials are entitled to qualified immunity unless they violated a constitutional right 'so clearly established that *every reasonable official* would have understood that what he is doing violates that right.'" *Fields v. City of Phila.*, 862 F.3d 353, 360–61 (3d Cir. 2017)(citing *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016)(emphasis in original). Although the police officers in *Fields* were granted qualified immunity, this grant was fact-specific and not applicable in the matter at hand. While the Third Circuit's case law had not established recording police officers in their line of duty as a First Amendment right prior to the events in question in *Fields*, the plaintiffs argued that the development of police policy explicitly recognizing such a right thereby clearly established it for purposes of qualified immunity. *Fields*, 862 F.3d at

361. The court denied this argument on the grounds of testimony from department officers and other evidence that suggested the policy was not clearly and effectively communicated through the department so that every officer would understand the right to exist. *Id.* at 362. Other courts have granted qualified immunity on different grounds.

In Robbins, the plaintiff was recording illegally parked vehicles outside of a police station. *Robbins v. City of Des Moines*, 984 F.3d 673, 676 (8th Cir. 2021). A detective, who was aware of recent vehicle crimes in the area and a prior incident where two police officers had been murdered by someone who was filming the police, approached the plaintiff and questioned him about his activity. *Id.* The court held that Robbins' filming activity paired with the apprehending officers' knowledge of prior criminal incidents of similar circumstances would allow a reasonable officer to believe that the plaintiff was up to more than merely recording. *Id.* at 678.

Importantly, Officer Johnson had no indication of prior criminal activity committed by Appellants before the protest at city hall, nor were Appellants intending any malice by recording the officers and other protestors. (R. at 9). Instead, protestors who had created prior videos espousing their passion and opinion on the school board matter and posted them online were branded as "troublemakers," and the officers were told to keep a special eye on them during the protest. *Id.* The gap between "troublemakers" who post videos on the internet and a prior murder committed by a person who had been recording

the police, as was the base for suspicion in *Robbins*, is more of a canyon than a crevice. Never mind the idea that citizens are allowed to speak their minds on public issues in the manner they choose, their "troublemaking" did not put the officers on reasonable notice of imminent danger like a murder or vandalism may.

Instead, this Court should adhere to the criteria set forth in *Fields* and address whether the Libertyville Police Department's policy on recording was communicated so that every reasonable official would have known of its existence. Here, Officer Johnson had clear, unambiguous knowledge of a right to record in Libertyville. (R. at 36) The officers working the protest were explicitly informed of this right by their superiors in their meeting and understood the limitations on the right to be that the recorders were not allowed to interfere with the officers' duties. *Id.* Paired with the fact that, like in *Fields*, Appellants were not interfering with Officer Johnson's official duties, there is no justification to prevent Appellants from recording the police at a protest. (R. at 11–15).

Ultimately, Appellants were not criminals whose actions triggered any threat based on prior conduct. They were merely active citizens intent on voicing their First Amendment rights—rights of which Officer Johnson and any reasonable Libertyville official knew. Applying the *Fields* framework here renders restrictions on Appellants' right to record unconstitutional.

D. Recording the Police at a Protest Falls Within the Broader Purpose of the First Amendment

The First Amendment is intended to promote an informed citizenry and to hold the government accountable through the dissemination of information. *Fields*, 862 F.3d at 359. As a matter of public policy, allowing citizens to participate in the news-gathering process—particularly in an age where smartphone technology and social media grant an amateur press pass to anyone who possesses them—is critical to effective self-government.

In *Fields*, the court held these principles core to its holding that a right to record exists. The Third Circuit held:

> To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.

Fields v. City of Phila., 862 F.3d 353, 359 (3d Cir. 2017). As a matter of policy, allowing citizens to record police in public—at protests and otherwise—enforces accountability for officers entrusted with a badge and weapon to uphold this

nation's laws. That was the focus of the Appellants here—not to break any laws, not to cause violence, but to simply illustrate an inequity in policing tactics at a protest and hold the appropriate officers accountable.

II. Appellees Retaliated Against Appellants for Exercising Their Clearly Established First Amendment Right to Record.

Generally, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). For a retaliatory action claim to succeed under the First Amendment, the plaintiff must establish a causal connection between the government defendant's "retaliatory animus" and the plaintiff's subsequent injury. *Id.* The causal connection must be one of "but-for" causation—the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Id.* (citing *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

In addition, a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Id.* at 1724. However, the no-probable-cause requirement does not apply if the plaintiff presents objective evidence to show that they were arrested when otherwise similarly situated individuals who were not engaged in the same sort of protected speech had not been. *Id.* at 1727. This is the first test to be met by a plaintiff attempting to establish a claim for retaliatory arrest. *Id.* at 1725. If this bar is met, then the causal connection test governs. *Id.*

At issue here first is whether Appellants have provided objective evidence that arrests of a similar nature have generally not been carried out in Libertyville. The second issue is whether Appellee's arrest of Appellants was caused by her retaliatory animus towards the Appellants' speech. On appeal, Appellants concede the existence of probable cause during these arrests but contend that objective evidence exists to show these arrests were atypical of those enacted by Libertyville police officers.

A. Appellants Show Objective Evidence That Arrests of The Kind They Endured Are Not Typically Enacted by Libertyville Police.

The United States Supreme Court has held, "The no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019). In *Nieves*, the Court illustrates this exception through the lens of a jaywalking offense. *Id.* at 1727. As the Court notes, "jaywalking is endemic but rarely results in an arrest." *Id.* "In such a case.... probable cause does little to prove or disprove the causal connection between animus and injury." *Id.*

The Ninth Circuit was the first court to apply this exception in practice. In *Ballentine*, the plaintiffs used sidewalk chalk to write anti-police messages on the sidewalks of Las Vegas, Nevada, including in front of the Las Vegas Metropolitan Police Department (Metro). *Ballentine v. Tucker*, 28 F.4th 54, 59

(9th Cir. 2022). Initially, plaintiffs were cited for a violation of Nevada's graffiti statute however prosecutors decided not to press the charges. *Id.* The plaintiffs' protests of police using sidewalk chalk included at least one incident officers were aware of yet declined to issue citations or execute any arrests. *Id.* at 59–60.

Following the plaintiffs' citation hearing, they once again "chalked" outside of the courthouse utilizing strong and explicit anti-police language. *Id.* The detective assigned to the case was present and observed and photographed the chalk. *Id.* However, he did not stop the plaintiffs from their drawing and did not issue any citations. *Id.* The detective later issued declarations for arrest of the plaintiffs, referencing the plaintiffs' affiliation with anti-police organizations as well as the anti-police sentiment of the chalk writings. *Id.* The plaintiffs were then arrested for conspiracy to commit placing graffiti and placing graffiti on or otherwise defacing property. *Id.*

The plaintiffs presented records indicating that only two individuals had even been suspected of violating Nevada's graffiti statute, resulting in just one citation. *Id.* at 62. The Ninth Circuit held this was evidence of the sort required under the *Nieves* exception to eliminate the lack of probable cause requirement. *Id.*

Officer Johnson's arrest of Appellants for misdemeanor criminal trespass closely resembles the jaywalking example in *Nieves* and the chalking protests in *Ballentine*. Officer Johnson arrested all six of the Appellants—each of whom

was exercising their First Amendment right to record at the protest—on charges of misdemeanor criminal trespass. (R. at 19). Such arrests are exceedingly rare in Libertyville—excluding the protest in the present case, there were six protests in the city of Libertyville between 2019 and 2021. *Id.* Only two total arrests were enacted at these protests—and neither arrest involved misdemeanor criminal trespass. (R. at 19). This demonstrates trespass is not a charge typically brought or enforced by Libertyville police at protests. It calls into question the true reason Officer Johnson decided to arrest Appellants.

Officer Johnson contends a safety issue was created when Appellants crossed the barricade line. Yet, the protestors were not arrested the first time they crossed the barrier—Officer Johnson waited until it happened again. The Appellants' first crossing of the barrier stemmed from passionate expression of their views on the tax levy decision. When Officer Johnson ordered them back into their designated space, Appellants complied. The second time Appellants crossed the barrier, they were merely trying to get a better angle to record disparate police treatment of the pro-levy group. When Officer Johnson ordered them back behind the barrier, Appellants once again complied without issue. The key difference between the two infringements upon the barricade is that the second time, Appellants were recording Officer Johnson and the other police officers at the protest. These are not the actions of a menacing mob intent on causing harm—this is a group enthusiastically exercising their voices under the First Amendment whose passion simply required a bit of harnessing.

That distinction depicts the true purpose behind Appellants' arrests—suppression of their First Amendment rights.

Much like police are generally unconcerned about jaywalkers, the actions of Appellants presented no tangible safety threat. As demonstrated by the officers' treatment of pro-levy protesters, a guidance-based approach is effective in containing a protest group. Notably, only one pro-levy protestor who was recording got arrested. (R. at 17).

Appellees may argue that prior protests involved similar exercise of free speech, and therefore the *Nieves* exception does not apply here. Yet, there is an objective difference in criminal misdemeanor trespass arrests between the single event in question and an aggregation of past protests. Officer Johnson's alleged statement to the protestors upon arrest: "maybe you'll stop making videos now," displays a clear retaliatory animus towards Appellants. A dispute about whether the objective evidence of prior arrests is sufficient for Appellants to prevail on their claims is one that should be answered by a jury.

B. Appellants' Arrest Was Directly Caused by Appellee's Retaliatory Animus Towards Appellants' Speech.

The plaintiff must establish a causal connection between the government defendant's "retaliatory animus" and the plaintiff's subsequent injury. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). The causal connection must be one of "but-for" causation—the adverse action against the plaintiff would not have

been taken absent the retaliatory motive. *Id* (citing *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

In *Ballentine*, the protestors' anti-police rhetoric was deemed to have been a reasonable animus for the detective's decision to arrest the "chalkers" due to his prior knowledge of the protestor's view of police. *Ballentine v. Tucker*, 28 F.4th 54, 59 (9th Cir. 2022). The court further held that an arrest, rather than a citation, enhanced the finding of retaliatory animus on the part of the detective. *Id*. "Coupled with the evidence already discussed, a reasonable jury could find that the anti-police content of Plaintiffs' chalkings was a substantial or motivating factor for effecting the arrest." *Id*.

In denying a motion to dismiss, the District of Wisconsin's decision in *Akindes* depicts another instance of disparate treatment by police. *Akindes v. City of Kenosha*, No. 20-CV-1353-JPS-JPS, 2021 U.S. Dist. LEXIS 187943 at *36 (E.D. Wis. Sep. 30, 2021). The court held that plaintiffs had properly alleged a First Amendment retaliation claim under the *Nieves* exception by showing Kenosha police arrested 150 protestors of police brutality for violating curfew. *Id*. In contrast, the department did not arrest any counter-protestors under the same circumstances. *Id*.

Officer Johnson's conduct both prior to and during the protest closely resembles that of the detective in *Ballentine* and the Kenosha police in *Akindes*. Her views in favor of the tax levy had been made public on her social media account and confirmed by Johnson herself. (R. at 48). Clearly, Officer Johnson

did not agree with the Appellants' view on the tax levy—and further, she had been part of a planning meeting that designated Appellants as "troublemakers" simply for making their passionate opinions known online. (R. at 15). However, perhaps the most incriminating piece of evidence that Officer Johnson's decision to arrest Appellants was retaliatory came after the protestors had been handcuffed, when she said, "maybe you'll stop making videos now." *Id.* While not objective evidence towards the probable cause exception to Nieves, such a statement could lead a reasonable jury to determine that Officer Johnson possessed retaliatory animus towards Appellants—at the very least, it exhibits a genuine dispute of material fact to be decided by a jury, not the court.

Officer Johnson's decision to arrest Appellants on charges rarely sought under similar circumstances in Libertyville, her vocal opinions on the tax levy, and her actions towards pre-conceived "troublemakers'' establishes both a retaliatory animus and causation for arrest, as required by *Nieves*. Accordingly, this Court should reverse the decision of the District Court below and deny summary judgment for the Appellees.

III. Conclusion

The lack of binding First Amendment right to record authority in this circuit dictates that such a right apply to Appellants' claim only if it has been "clearly established" by other authority such that a reasonable police officer would have known of its existence. The holdings of all seven circuit courts to

consider the issue display not only a general right to record, but specifically a right to record the police at a protest. Further, the arrest of Appellants does not constitute a reasonable time, place, or manner restriction on their right to record under the circumstances.

In addition, Appellants show objective evidence that arrests of similar kind are not typically enforced in Libertyville, thus negating the no-probable-cause requirement stipulated in *Nieves*. Officer Johnson's decision to arrest Appellants was based solely on her animus towards the group for exercising their First Amendment rights and her disagreement with their beliefs on the proposed tax levy.

Accordingly, Appellants respectfully request this Court to reverse the District Court's decision and Appellees should be denied judgment as a matter of law.

Certificate of Compliance

Kyle Steinberg, attorney for the Plaintiff-Appellants, certifies this brief complies with the type-volume limitation contained in Local Rule 1(f) in that it contains 5,300 words, excluding the parts of the brief exempted by Local Rule 1(f), and relying upon the word count of Microsoft Word for Windows, the word-processing program used to prepare the brief. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Local Rule 1(b) as it has been prepared in a proportionally spaced typeface using Microsoft Word for Windows in 12-point Bookman Old Style font.

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